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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6033

SHARON ROE and DOROTHY POE, on behalf of themselves and others similarly situated,

Appellants,

v.

NICHOLAS NORTON, individually, as Commissioner of Welfare of the State of Connecticut, and on behalf of others similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF

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OPINIONS BELOW

The opinions of the United States Three Judge District Court are reported at 365 F. Supp. 65 (majority opinion) 84 (concurring opinion). The opinion for the District Court for the District of Connecticut denying preliminary relief in a companion case, *Doe et als v. Norton,* is reported at 356 F. Supp. 202.

JURISDICTION

Appellants brought this action under the Civil Rights Act, 42 U.S.C. Section 1983, jurisdiction being conferred on the District Court by 28 U.S.C. Section 1343(3). In it they sought declaratory and injunctive relief under 28 U.S.C. Section 2201 et seq.

The constitutionality of a state statute being in question, this action was consolidated with *Doe et als. v. Norton* (Civil Action No. 15,579, U.S.D.C., D. Conn.) in which a three judge court had previously been convened under 28 U.S.C. Section 2281 and 2284.

The court below filed its Memorandum of Decision, Findings of Fact and Conclusions of Law on September 5, 1973; Judgment thereon was entered September 7, 1973.

Appellants filed their notice of appeal November 5, 1973. Jurisdiction over this appeal is predicated on 28 U.S.C. Section 1253, see e.g. *Carter v. Stanton* 405 U.S. 669 (1972). On January 4, 1974, Appellants filed their Jurisdictional statement. On February 19, 1974, the Court noted probable jurisdiction and granted Appellants' Motion to Proceed In Forma Pauperis.

QUESTIONS PRESENTED

1. Does Connecticut General Statute Section 52-440b contravene the Social Security Act provisions concerning the purposes of Aid to Families with Dependent Children (AFDC), eligibility for AFDC, confidentiality or protection of individual dignity?[1]

2. Does the statute violate the Equal Protection principle by establishing suspect classifications of

[1] Although this question was not presented in the Jurisdictional Statement, it was decided below and must be decided before reaching the other questions.

illegitimacy and sex, by impinging discriminatorily on a fundamental interest or by classifying people irrationally for recoupment purposes?

3. Does the statute arbitrarily and unnecessarily impinge upon the constitutional right of privacy by denying all mothers of illegitimate children freedom of choice as to whether to attempt to establish their children's paternity and by forcing them to disclose intimate details of their sexual lives in a public forum?

4. Does the statute violate due process by containing an irrebuttable presumption or by overbreadth and lack of standards?

5. Is the statute the least drastic means of promoting a legitimate state policy?

STATUTES INVOLVED

The statute involved, Connecticut General Statute Section 52-440b, provides:

> "(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a divorce decree or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or guardian ad litem of such child, such mother may be cited to appear before any judge of the circuit court and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.

"(b) Any woman who, having been cited to appear before a judge of the circuit court pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."

Other statutes and regulations involved are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

This action to challenge Connecticut General Statutes (C.G.S.) Section 52-440b on constitutional grounds (and its applicability to welfare recipients on grounds of conflict with the Social Security Act) was brought by complaint filed January 31, 1973 in the United States District Court for the District of Connecticut. At hearing February 26, 1973 on plaintiffs-appellants (hereinafter "appellants") motion to convene a three judge court, the District Court, per Newman, J, ordered it consolidated with a similar case, *Doe et als. v. Norton* (D. Conn. Civil Action No. 15, 579) in which a three judge court had already been ordered convened. All subsequent proceedings in the District Court involved both actions. All plaintiffs have proceeded at all times under pseudonyms in order to protect the privacy they seek to establish in this action.

Under C.G.S. Section 52-440b, refusal by the mother of an illegitimate child to divulge the name of the putative father of her child to an appropriate official authorizes that official to commence an original civil contempt procedure,[2] which may result in up to one

[2] Although nothing in C.G.S. Section 52-440b designates it as "civil", it is the Attorney General's position that that is the case; appellants do not dispute that interpretation; see Stipulations of record, Par. 2. (A. 56)

year imprisonment and a two hundred dollar fine.[3] Under it the appellant class of mothers may be forced 1) to appear in court, 2) to testify as to the name and other identifying information about the putative father,[4] 3) to "institute" a paternity action, and 4) to "prosecute" a paternity action. Under a different statute, C.G.S. 52-440a, the Welfare Department has the power to bring a paternity action in the name of the Commissioner. The mother can be forced to testify at the trial of any paternity action, C.G.S. Section 52-435b and 440a.

Appellants are the classes of mothers and children subject to the statute. This action was originally brought by two mothers on behalf of themselves, their children and the classes represented by each (Complaint, para. 4, Substituted Complaint, para. 4). (A. 5, A. 22)

The District Court, believing that there might be a conflict of interest between appellant mothers and their children, appointed separate counsel to represent any separate interests of the children. Such counsel

[3] While the requirements of Section 52-440b to divulge the father's name and to bring and prosecute paternity actions appear to apply to all mothers of illegitimate children, only in three sub-categories is there any enforcement provision. These are a) State Welfare recipients, b) town welfare recipients, and c) instances in which some competent court has appointed a guardian or guardian ad litem who is not the mother. The District Court construed the statue to apply to all mothers.

[4] While the statute does not in terms refer to identifying information other than name, it does require the mother to "prosecute" a paternity action. Since the Commissioner of Welfare has the power to institute a paternity action if the mother neglects to do so, and other identifying information is necessary for him to do so, the statute has been construed to require divulgence of other identifying information. Transcripts included in Appendix to Children's Brief, *passim*.

appeared and have represented the children as separate parties to the action since that time.

Appellant mothers submitted their pseudonymous affidavits as evidence, by agreement of counsel; Single Appendix (A. 47 and A. 50). They also submitted affidavits from twelve other members of the class of mothers, including the plaintiffs of the companion case; (A. 36-52). Dorothy Poe indicated that she did not wish to prosecute a paternity action because of substantial fears that the pressure of testifying in court might cause her to undergo a nervous breakdown, and because neither she nor her older child had realized any benefit from prosecuting the older child's father even though a judgment of paternity had been obtained; A. 24. Sharon Roe indicated certainty that her child's father would never contribute to her support and a good chance that he would break off his developing relationship with the child if she tried to force him to do so. Ms. Roe had only been a recipient of AFDC benefits a short time and expected to terminate them soon; A. 51.

In the cases of several other members of the class, the mother reasonably feared that the father would cause serious harm to herself and/or the child if she were to prosecute him; A. 37, 41. In one case, the mother had religious scruples against prosecuting a lawsuit; A. 44-5. In other cases, the mothers had declined to divulge the father's name because the statute of limitations had run, so that the fathers already had a good defense to a paternity action under the statute; C.G.S. Section 52-435a; A. 38, 52. In several cases, the mother and child were fully protected because the mother had in her possession a signed acknowledgment of paternity, which could form the basis of a later support order under C.G.S. Section 52-442a; A. 39, 40, 46-7. In two cases, the mother was not herself certain of the father's identity; A. 45, 49. In

all of the cases the mothers had made an informed choice that the chances of detriment to themselves and/or to their children were greater than the chances of gain.

Some of the mothers, notably the two named Appellants, also stated their firm belief that the decisions in these areas should be theirs alone.

Counsel for the children deposed Dr. Albert Solnit, director of the Yale Child Study Center and co-author of the recent book *Beyond the Best Interests of the Child* with Anna Freud and Joseph Goldstein. They also deposed three Welfare Department officials: Caroline Packard, Joseph Mancini, and Joseph Nadolski, and submitted an affidavit from Dr. Edward Zigler, former head of the office of Child Development at the Department of Health, Education and Welfare. Both experts took the position that the interests of the illegitimate children, especially their psychological interests were in the general case, not advanced and might well be harmed by the statute. Ms. Packard testified that Section 52-440b and the policies implementing it had been submitted to the Department of Health, Education and Welfare, that the Welfare Department exercised little discretion in determining whether to refer a case of refusal to comply to local private counsel to bring petitions under the statute, and that counsel were paid on a per case basis; (A. 72-92) Mr. Nadolski and Mr. Mancini described the local practice in the District offices in which they worked. Both were members of the resources staff, not the social work staff; A. 93-124.

The Defendant offered no legislative history or evidence, except some statistics concerning the incidence of illegitimacy; A. 56-61. There was no evidence of utilization of the statute by other members of the defendant class: town welfare officials, guardians or guardians ad litem. At hearing, counsel for defendant admitted that he did not know whether the statute had

ever been utilized by any of the parties given statutory enforcement powers other than the named defendant.

Hearing on the merits was held April 30, 1973 before Timbers, Circuit Judge, and Blumenfeld and Newman, District Judges. Both parties filed late submissions concerning subsequent regulations issued by the Department of Health, Education and Welfare. On September 5, 1973 the Court, per Blumenfeld, J, filed its Memorandum of Decision, Findings of Fact and Conclusions of Law denying appellants' applications for declaratory and injunctive relief, and dismissing the case. The majority opinion found that there was no direct conflict between Section 52-440b and the Social Security Act, distinguishing *Meyers v. Juras* 404 U.S. 803 on the basis of the decision in *New York State Dept. of Soc. Servs. v. Dublino* 413 U.S. 405. It held that the constitutional right of privacy incorporated no privilege against testimony except in situations where the Fifth Amendment was applicable, and that the statute did not violate Equal Protection or Due Process. It denied plaintiffs' other claims, including their claim that the statute denied them their constitutional right to determine their children's upbringing, summarily and without authority. Judge Newman filed a separate opinion, concurring. He however, felt that there was a possible violation of the privacy right in some cases cognizable under the statute and concurred because he thought the statute not unconstitutional on its face. None of the judges addressed the applicability of Section 52-440b to the specific cases before them. On September 7, 1973, the District Court entered judgment accordingly.

This appeal followed. On January 4, 1974, appellants filed their jurisdictional statement, following Notice of Appeal filed November 5, 1973. Appellees filed a motion to dismiss or affirm. On February 19, 1974 this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The purpose of the statute is unclear, but even if there were a "legitimate" purpose, the regulation is too broad and operates by means which stifle fundamental liberties; *Shelton v. Tucker* 364 U.S. 479. Appellants do not claim that their right as parents, to control their family destiny is absolute, but rather that the statute is substantively and procedurally unconstitutional. The mothers delineate three conceivable purposes for the statute: 1) recoupment of state AFDC benefits; 2) protection of children's interests and 3) punishment of mothers. They then note the different analyses necessary to determine whether the statute is valid depending on the purpose selected.

I. First, the statute violates the Social Security Act. Since it applies specifically to AFDC mothers and is administered through the AFDC program, it must comply with the Act in order to survive a challenge based on the supremacy clause; *King v. Smith* 392 U.S. 309.

The statute is fatally inconsistent with the Social Security Act in at least four ways: 1) In removing the mother's power to decide questions for her family on a wholesale basis and in its sanctions, Section 52-440b violates the purpose of AFDC; *King v. Smith*, supra. 2) In deterring applications for benefits it is an additional condition of eligibility inconsistent with federally mandated standards; *Townsend v. Swank* 404 U.S. 282. The statute is nothing more than an attempt to get around the injunctions against requiring mothers of illegitimate children to disclose the father's name as a condition of eligibility for AFDC; *Juras v. Meyers* 404 U.S. 803, aff'g 327 F. Supp. 759; *Doe v. Shapiro* 302 F. Supp. 761 (D. Conn. 1969). app. dismissed 396 U.S. 488. 3) In subjecting the mothers to a public courtroom hearing of private information, the statute violates the Act's confidentiality requirement; 42

U.S.C. 602(a)(9). 4) The statute is no more authorized by NOLEO than were the regulations struck down in *Juras v. Meyers*, supra. and *Doe v. Shapiro*, supra. *Townsend v. Swank*, supra., not *New York Dep't of Soc. Servs. v. Dublino* 413 U.S. 405, is applicable to this statute. The recent H.E.W. regulations purporting to authorize termination of the mother from assistance even if they were valid, are irrelevant to this case, where the sanctions are jail and a fine; *Shirley v. Lavine* 365 F. Supp. 818 (N.D.N.Y. 1973) app. pending; *Juras v. Meyers*, supra.

II. The statute also violates equal protection. It penalizes mothers and children drawing on what should be seen as a suspect classification, illegitimacy; *Weber v. Aetna Cas. and Sur. Co.* 406 U.S. 164. Its categories are neither the best possible nor supportive of any legitimate state purpose. And it impinges on a fundamental interest without embodying classifications fitted to such a legitimate purpose; *Eisenstadt v. Baird* 405 U.S. 438; *Shapiro v. Thompson* 394 U.S. 618. Furthermore, it fails to vindicate an operation solely against mothers, thereby discriminating on the basis of sex; *Reed v. Reed* 404 U.S. 71. Nor are the categories set up procedurally or substantively, rationally related to what otherwise appears to be the more likely purpose of the statute: recoupment; *Rinaldi v. Yeager* 384 U.S. 305; *James v. Strange* 407 U.S. 128. Finally the classifications are irrational as measured against other purposes, suggesting that the real purpose of the statute is punitive; *James v. Strange*, supra, *U.S. Department of Agriculture v. Moreno* 413 U.S. 528.

III. The mothers also submit that Section 52-440b violates their liberty as guaranteed by the Fourteenth Amendment under the constitutional "zone of privacy"; *Griswold v. Connecticut* 381 U.S. 479; *Pierce v. Society of Sisters* 268 U.S. 510; *Stanley v. Illinois* 405 U.S. 645. Specifically, the statute compels them to testify in a proceeding which does not advance any compelling

state interest, about the details of their otherwise private sexual lives; *Griswold*, supra., removes their right to decide important questions of family policy; *Pierce v. Society of Sisters*, supra., and forces them to "institute" and "prosecute" lawsuits whether they want to or conceive it in the best interests of all involved; *West Virginia Board of Education v. Barnette* 319 U.S. 624, all without advancing any compelling interest of the state or any other party. The procedures utilized further violate due process in their irrebuttable presumption as to the child's interests; *Stanley v. Illinois*, supra., overbreadth; *Roe v. Wade* 410 U.S. 113, and lack of statutory standards; *Giaccio v. Pennsylvania* 382 U.S. 397. Finally the statute is far too sweeping and drastic to be justified by any of its supposed purposes. Thus it violates the mothers' and children's constitutional right to be let alone.

INTRODUCTION

> If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself but because it is his own mode.[5]

Recognizing that some people lack even a "tolerable amount of common sense", appellants do not contend that the State has no right under any circumstances, to require mothers of illegitimate children to divulge the names of the fathers and prosecute paternity actions. But a statute attempting to regulate the behavior of those few persons without any tolerable amount of common sense must define its purpose clearly and be narrowly drawn to protect the constitutional rights of

[5] John Stuart Mill, *On Liberty* (Dolphin Books, Doubleday and Co., Garden City, New York, 1961) 544.

the others. It must have appropriate standards and procedures, treat equally situated parents and children equally, may only use appropriate sanctions, and must not be inconsistent with any applicable federal statute. By all of these criteria, Connecticut General Statutes (*C.G.S.*) Section 52-440b is constitutionally defective:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton v. Tucker* 364 U.S. 479, 488 (1960).

The language of Section 52-440b and the evidence on file indicate that it is applied generally rather than to a few cases of particular abuse.[6] Although the statute contains the term "may" which led the District Court to conclude that it would not be applied "woodenly", there are no statutory criteria guiding its application by state courts. The legislative history is obscure: it is not clear what the purpose was intended to be.[7] Whatever

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[6] Stipulation of the parties, (A. 52) para 1. Mancini deposition, *passim.* (A. 93-102), Packard deposition, *passim.* (A. 72-92).

[7] There is no legislative history other than the obvious attempt to avoid the consequences of those decisions which denied states the right to condition eligibility for AFDC benefits on the mother's willingness to name the father; *Doe v. Shapiro* 302 F. Supp. 761, app. dismissed 396 U.S. 488, reh. denied 397 U.S. 970 (and others cited infra pp. 17). Although these cases were concerned with the States' purpose of recouping AFDC benefits paid out, Appellee argued that the statute was intended to protect and advance the interests of illegitimate children. The District Court added to the confusion over the statute's purpose by variously arguing that the statute was an appropriate exercise of the State's right to recoup under NOLEO (42 U.S.C. Section 602(a)(17) and (18), 365 F. Supp. 65, 82, but also advancing the purpose of protection of the children's interest, chiefly if not exclusively their future financial interests, 365 F. Supp. 65, 74-5 n. 14 (Blumenfeld, J) 85 (Newman, J, concurring).

Neither Appellee nor the District Court addressed the conflict between the child's best interests, which in any case are not

its broader purposes, Section 52-440b functions to require mothers of illegitimate children to seek financial support from the father of those children, in practice recoupment to the state for AFDC money expended, by forcing paternity actions upon the mothers regardless of whether any benefits would actually accrue to them or the child or of whether seeking such support would be in the child's best interest.

The confusion of statutory purposes is important because the suggested purposes are not consistent with each other and because they call for different analyses. Appellants submit that a recoupment purpose does not justify Section 52-440b because its classifications are irrationally underinclusive, because such a purpose is not sufficiently compelling to overcome the mother's private right to make financial decisions, a right protected by the Social Security Act as well as the constitutional right of privacy, and because it conflicts directly with several other purposes of the Social

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exclusively financial, and the State's interest in recoupment, an omission which is curious in light of the concern with the much less likely conflict of interest between children and their mothers. Nor did either deal with Appellants' suggestion that the real purpose of the statute is to punish the mothers for bearing children out of wedlock, a purpose which becomes clear because of the irrationality of the statute measured according to the other purposes (See Part III A infra).

Appellee's administrative practices and the decisions of state courts negate the theory that the statute was intended to advance the children's interests. Joseph Mancini, a resource worker (not a children's services worker) testified that both the social worker and he lacked discretion to determine that the child's best interests require not pursuing the issue A. 92-102, and that he doesn't ask mothers why they don't want to pursue the fathers because that is irrelevant *Ibid* A. 109. Mancini concluded: "We convey to her that . . . the only reason we want this gentleman for is to help pay the expenses. . ." A. 117. The only written state court decision constuing the statute finds the state's recoupment interest to be its sole purpose; *Commissioner of Welfare v. Larracuento* CV2-94960 (Henebry, J); and other oral decisions are in accord; see Transcripts included in the Appendix to Children's Brief.

Security Act. Nor does the statute survive if it is designed to advance the interests of all illegitimate children because its classifications and administration are not designed to elicit those interests and it is far from the least drastic means of advancing those interests. And a punitive purpose would clearly violate the Eighth Amendment in addition to falling for all of these reasons.

I.

CONNECTICUT GENERAL STATUTES SECTION 52-440b IS INCONSISTENT WITH THE SOCIAL SECURITY ACT.

Because Section 52-440b specifically applies to mothers and children receiving assistance under the AFDC program, it is invalid under the supremacy clause unless it complies with the Social Security Act; *King v. Smith* 392 U.S. 309 (1968), and valid regulations issued by the Department of Health, Education and Welfare under that act; *Lewis v. Martin* 397 U.S. 552 (1970). To place the statute in proper perspective, it is necessary to sketch the whole scheme of statutes designed to enforce support obligations. Appellants will then show that Section 52-440b contravenes the Social Security Act in several ways.

Connecticut has a special chapter governing bastardy actions, Chapter 911, C.G.S., Sections 52-435 et seq. Chapter 911 provides a statutory cause of action, available on behalf of any child born out of wedlock, including any child born to a married woman whose husband is not the child's father. The primary purpose of bastardy actions is not to protect the child's interests; rather it is to assist the mother in providing support for the child; *Pelak v. Karpa* 146 Conn. 370, 151 A.2d 333 (1959). The other major purpose of the

procedure is to save the public from the burden of supporting the child, *Pelak v. Karpa, supra* at 373. Section 52-440b was added to Chapter 911 in 1971.

The general enforcement procedure for the securing of support for any individual from his or her legally liable relatives, is found in Conn. Gen. Stats. Section 17-320:

> . . . Proceedings to obtain such orders of support shall be instituted by a verified petition with summons and order, in a form approved by the judges of the circuit court, of the husband or wife or any relatives or the conservator of such poor person. Upon the filing of such petition, the judge shall cause a summons, signed by him or by the clerk or assistant clerk of said court, to be issued requiring such relative or relatives to appear in court, at a time and place named, for a hearing upon such petition . . . the circuit court . . . may order such relative or relatives to contribute to such support . . . such sum as said court deems reasonably within each such relative's ability to support such person.

By its terms, Section 17-320 applies without regard to the legitimacy or illegitimacy of the parent-child relationship.

When the issue of child support arises during or following the dissolution of marriage,[8] it is within the jurisdiction of the Superior Court, C.G.S. Section 46-26:

> . . . upon the complaint of either parent . . . made to the Superior Court, or upon motion with order and summons, made to the Superior Court in any case by either parent or by the commissioner of finance and control and subsequent to the granting of a decree of dissolution, it shall inquire into their pecuniary ability and may make and enforce such decree against either or both of them for the

[8]Prior to October 1, 1973, known as divorce. (See P.A. 73-373).

maintenance of such child as it considers just, and may direct security to be given therefor.

Connecticut thus provides adequate statutory tools which can be used by one parent against the other parent in securing financial support for a child, without Section 52-440b. Where it has contributed to the child's support, the relevant administrative agency is empowered to proceed directly against a defaulting parent.

Compliance with statutory eligibility requirements entitles any "dependent" child to support from the state through the Aid to Families with Dependent Children (AFDC) program C.G.S. Section 17-82d. Connecticut does not, despite the availability of Federal reimbursement, provide children with an "unemployed parent" program. (See 42 U.S.C. Section 607). Eligibility for AFDC benefits may be established prior to the child's birth; *Wisdom v. Norton* (D Conn. 1973 Civil Action 15,906). The named appellants are all recipients of assistance under the AFDC program.

Receipt of AFDC benefits changes the parental obligation to support in several ways. First, it obligates the absent parent to the State rather than to the child for such period of time and to such extent as the child is supported by the AFDC benefits. Second, recent cases recognize that it changes the parental obligation from one which is not dischargeable in bankruptcy to one which is so dischargeable, *In re Ashby*. (Bankruptcy NK 266-72B8) (W.D. Mich. 1973).

Third, it brings into play the so-called NOLEO provisions of the Social Security Act, 42 U.S.C. Section 602(a)(17) and (18), which require states to maintain programs to aid the present parent in securing support from the absent parent.

For a number of years prior to 1969 the Connecticut State Welfare Department pursued a policy of requiring any recipient who was the mother and supervising relative of an illegitimate child to divulge the name of

the child's putative father as a condition of the child's eligibility for Aid to Families with Dependent Children (AFDC). This practice was enjoined as violative of the Social Security Act, and unauthorized by the NOLEO provisions, *Doe v. Shapiro* 302 F. Supp. 761, (D. Conn., 1969), appeal dismissed 396 U.S. 488, reh. den'd, 397 U.S. 970 (1970). The Department thereafter attempted to require such divulgence as a condition of the mother's eligibility for AFDC benefits as a supervising relative. This practice also was enjoined, *Doe v. Harder* 310 F. Supp. 302 (1970), appeal dismissed, 399 U.S. 902 (1970). This Court reached the same conclusions in summarily affirming substantially identical decisions from three other Districts, *Meyers v. Juras* 404 U.S. 803, reh. den'd 404 U.S. 961 (1971), *Carleson v. Taylor* 404 U.S. 980 (1972), *Weaver v. Doe* 404 U.S. 987 (1971). Now Connecticut is at it again. After the second *Doe* decision, the Department supported H.B. 6040, now C.G.S. Section 52-440b, which again seeks to compel mothers of illegitimate children to prosecute paternity actions.

The enforcement mechanism, however, has made the law more draconian: now, instead of being terminated from receipt of welfare benefits a mother may be imprisoned and fined and a child deprived of the care of its mother.

In *Pearce v. Harder* (D. Conn. Civil No. 13,747 (1970), the District Court preliminarily enjoined the Connecticut State Welfare Department from requiring the parents of AFDC children to sign nonsupport warrants for a deserting parent's arrest as a condition of eligibility. See also *Doe v. Carleson* 356 F. Supp. 753 (N.D. Calif. 1973), *Doe v. Swoap* (N.D. Calif. 1973 Civil No. 69-666 RFP Peckham, J.). The Connecticut

Welfare Department thereupon abandoned the practice.[9]

Despite the fact that the parent having custody of any child may be the sole available source for information of value to the child in pursuing claims for support, Connecticut has never sought to require the divulgence of such information from the parent of a legitimate child on pain of fine or imprisonment. Nor has it attempted to protect its own fisc by requiring welfare mothers of legitimate children to divulge such information on pain of fine or imprisonment.

A. The statute violates the purpose of AFDC.

The imposition of the penalties of imprisonment, fine, or public disclosure of intimate details of the personal life of a mother who is an AFDC supervising relative, as the plaintiffs are, is inconsistent with the basic purpose and objective of the Social Security Act.

> The AFDC Program was enacted:
> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation and other services. . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal and independence consistent with the maintenance of continuing parental care and protection. . . . 42 *U.S.C.*, Section 601

[9] *Pearce* was dismissed February 20, 1973 without prejudice. Current state policy is to require parents to appear at the Family Relations office of the Circuit Court, as a condition of eligibility, but does not require signing of complaints; see Conn. State Welfare Manual Vol I, Chapter III, Section P-3919 (Set forth in full in the Appendix to this Brief).

The protection of children from the hardships stemming from extreme poverty "is the paramount goal of AFDC." *King v. Smith, supra,* 392 U.S. at 325. Congress provided for the needs of the supervising relative, for example, when it became clear that the absence of such assistance jeopardized the health of the eligible children as well as the maintenance of an adequate home life for them. 64 Stat. 551, 42 U.S.C., Section 606(b). *See,* e.g., H.R. Rep. No. 1300, 81st Cong., lst sess. at 8,170; 95 Cong. Rec. 8584-5 (1950) (Remarks of Sen. Lucas): *Id.* at 8794. (Remarks of Sen. Lehman); *Id.* at 8813-14 (Remarks of Sen. Benton).

Connecticut General Statute Section 52-440b is inconsistent with these purposes of the AFDC Program. The imprisonment of an AFDC mother for the purpose of protecting the financial interests of her child, authorized by 52-440b, violates the statutory objective of fostering parental care of dependent children since the imprisonment would remove parental care.[10] Similarly detrimental is the imposition of fines up to $200 to AFDC families whose monthly income does not exceed a theoretical maximum of the minimum cost of living, as of July 1, 1969. *See,* 42 U.S.C. 602(a)(23) and *Johnson v. White* D.C. Conn., Docket Number 14,620. See also *Doe v. Schmidt* 330 F. Supp. 159, 167 (E.D. Wisc., 1971).

The 52-440b judicial citation and public examination of the conditions of illegitimacy would publicly brand both mother and child with the "continuing stigma of unwed motherhood" recognized by the Court in *Roe v. Wade* 410 U.S. 113, 153 (1973). The humiliation and degradation inherent in a contested paternity action

[10] This is not like a situation in which the mother would go to prison for a crime unrelated to the financial interests of her child, since coercion of her judgments concerning the family's best interests is the sole purpose of Section 52-440b.

would similarly harm both mother and child, and would expose the most private, intimate portions of a mother's life for public consumption.

Humiliation, imprisonment, and the imposition of financial hardship are diametrically opposed to the basic objective of the Social Security Act of "encouraging the care of dependent children" and do not "maintain and strengthen family life." 42 U.S.C. 601.

Additionally, H.E.W. regulations require that departmental standards "will not result in practices which violate the individual's privacy and personal dignity, or harass him or violate his constitutional rights." 45 C.F.R. 206.10(a)(10). The activities of court citation, public disclosure of confidential information or imprisonment of a non-criminal harass, embarass, and shame the recipient mother to the point that she must eventually choose between the removal of her family from welfare assistance or jail.[11] Thus, the Department of Health, Education and Welfare intended to incorporate in this regulation a "zone of privacy" at least as extensive as that constitutionally required; see Part III, infra.

B. Deterring applicants by providing AFDC benefits subject to a penalty is in effect an additional condition of eligibility.

As noted above the Connecticut Welfare Department was enjoined from refusing AFDC assistance to mothers and illegitimate children if the mother refused to disclose the putative father's name. *Doe v. Shapiro* 302 F. Supp. 761 (D. Conn., 1969), *appeal dismissed*, 396

[11]It is ironic that while the Connecticut Welfare Commissioner is proceeding in a no holds barred manner against AFDC mothers of illegitimate children that the department has consistently neglected to provide a service required by 42 U.S.C. 602(a)(15) for all state programs; "preventing or reducing the incidence of births out of wedlock."

U.S. 488, *rehearing denied*, 397 U.S. 970 (1970) and *Doe v. Harder* 310 F. Supp. 302 (1969) app. dismissed 399 U.S. 902 (1970). And see *Weaver v. Doe* 404 U.S. 987 (1971); *Carleson v. Taylor*; and *Juras v. Meyers*, 327 F. Supp. 759, aff'd 404 U.S. 803 (1972) (referred to hereinafter as the three summary affirmances). The rationale behind each of these decisions was elaborated in *Townsend v. Swank* 404 U.S. 282, 30 L.Ed.2d 448, 453 (1972):

> Thus *King v. Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

The compelling statutory authority of 42 U.S.C. 602(a)(10) for this line of cases requires that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." See also, *King v. Smith*, 392 U.S. 309 (1968).

Connecticut's repsonse to the judicial prohibition of their denial of assistance to non-cooperating unwed mothers and their children has been to deter them from seeking AFDC assistance by subjecting them to a penalty. But the admonition of 602 (a) (10) that "aid. . . . . shall be furnished. . . . . to all eligible individuals" cannot logically be circumvented by substituting aid subject to a penalty in place of a refusal to provide aid. The protection extended to plaintiffs by the Social Security Act is destroyed when interpreted to permit far harsher treatment of the plaintiffs simply because they are protected from termination; the provision of welfare assistance subject to the penalty of possible imprisonment creates a strong deterrent to mothers contemplating application for assistance. A deterrent to application for assistance is not a legitimate

state purpose, *Shapiro v. Thompson* 394 U.S. 618. In effect a deterrent is the same as an additional condition of eligibility. The defendant's practices and procedures pursuant to 52-440b are thus barred by the decisions in *Doe v. Shapiro, supra,* and *Doe v. Harder, supra* and the three summary affirmances. As such they violate Section 602 (a) (10).

C. The statute violates the Social Security Act strictures against the public disclosure of confidential information.

Welfare recipients are safeguarded from the disclosure of confidential information by 42 U.S.C. 602 (a) (9) and 45 C.F.R. 205.50 which limit disclosure to administrative purposes such as eligibility, providing services, and determining eligibility. Citation and a public examination of the conditions of illegitimacy as a part of the AFDC Program clearly violate these Social Security Act safeguarding provisions.

D. The statute is not authorized by NOLEO.

The State Welfare Department's responsibilities in determining paternity and obtaining support are contained at 42 U.S.C.A. 602 (a) (17) and (18) and 45 C.F.R. 220.48 the so-called NOLEO provisions whose pertinent sections provide that: (1) the state agency will make efforts to establish paternity and secure child support; (2) the state agency will establish a single organizational unit to establish paternity and seek child support; and (3) the state agency must establish a plan for cooperation with court and law enforcement officials and provide pertinent information to courts and law enforcement officials.

There is no indication of any intent in Sections 602 (a) (17) and (18) to authorize action against welfare mothers, and such action is therefore barred because it is contrary to the basic objectives of the Social Security Act as defined in 42 U.S.C. 601 as well as provisions requiring the furnishing of assistance to all eligible individuals, 42 U.S.C. 602 (a) (10), safeguarding confidential information, 42 U.S.C. 602 (a) (9), and preventing harassment and violation of a recipient's privacy and dignity. The clear statutory intent of 42 U.S.C.A. 602 (a) (17) and (18), when read with other provisions of the Act is to require departments to provide programs assisting the present parent and/or itself to obtain support from nonrecipient legally liable relatives.

C.G.S. Section 52-440b is administered, as applied to welfare recipients, its major if not sole target group, as a part of the AFDC program; Depositions of Caroline Packard and Joseph Mancini, *passim* (A. 72-92, 103-124) and Conn. State Welfare Manual vol 1, p-3460 (reprinted in the Appendix to this Brief). Miss Packard testified that the policy was submitted to the Department of H.E.W., a normal procedure for AFDC policy which would be entirely pointless for any police power regulation of general applicability. Thus, although the statute is not formally a part of the Chapter dealing with AFDC, it must be struck down as violation of the Supremacy Clause.

In striking down an Oregon regulation requiring, as a condition of AFDC eligibility that the mother sign a non-support complaint, Judge Goodwin stated:

> The State Public Welfare Division was directed by Congress to secure the mother's cooperation in developing potential income resources, but it was not authorized to terminate an AFDC grant (which is for children) to coerce the cooperation of a mother . . . Neither do we hold that the State of

> Oregon may not seek the AFDC mother's cooperation *through means less drastic than the withdrawal of benefits* from her children. Juras v. Meyers 327 F. Supp. 759, 762, affirmed 404 U.S. 803, (1972) (emphasis added).

Clearly Section 52-440b uses means which are substantially more drastic, from the child's point of view as from the mother's, than those found to be unacceptable in *Juras*.

New York State Department of Social Services v. Dublino 413 U.S. 405 (1973) does not support Appellees here. In *Dublino* the Court held that the Social Security Act work rules (WIN) did not "provide the exclusive mechanism for establishing work rules under AFDC" 413 U.S. 405, 411, n.9. The Court emphasized that the essentially similar but farther-reaching state work rules at issue did not conflict directly with any other provision of the Social Security Act, nor did the case present a serious claim of constitutional immunity from such rules. Here, by contrast, there is direct conflict with one regulation and three separate provisions of the Act, as well as serious claims that the statute violates the mothers' constitutional rights. Compare *Townsend v. Swank* 404 U.S. 282 (1971); *Carleson v. Remillard* 406 U.S. 598 (1972), and the three summary affirmances. Indeed, the conflict with the Act is even more direct than it was in the three summary affirmances in that the sanctions and procedures involved with Section 52-440b contravene additional provisions of the Act.

As the District Court for the Northern District of New York put it, in distinguishing *Dublino*, from a case involving the so-called NOLEO regulations:

> A striking distinction between the two is that with respect to WIN, Congress made participation a condition of eligibility, while Congress has made no such provision in regard to NOLEO. . . .

> The Court's disposition in *Dublino* furnishes further support. While the Court resolved the pre-emption question against the plaintiffs, it nevertheless remanded the case for consideration whether New York provisions were in conflict with specific Social Security Act provisions, the very issue before this Court.

Shirley v. Lavine 365 F. Supp. 818, 824 (N.D.N.Y. 1973) appeal pending No. 73-1095.

Nor does 45 C.F.R. Section 233.90 (38 Fed. Reg. 10940), the H.E.W. regulation purporting to permit termination of assistance to mothers but not children, because of failure of the mothers to disclose the names of the fathers, aid the Commissioner. The regulation has been declared invalid; *Shirley v. Lavine, supra,* and it only purports to authorize the sanction of termination of assistance, a sanction not permitted under Section 52-440b. The sanctions involved in Section 52-440b, incarceration and fine, conflict even more basically with several provisions of the Social Security Act.

II.

THE STATUTE VIOLATES EQUAL PROTECTION.

Section 52-440b stands as something of an anomaly in Connecticut's law governing guardianship and support, both substantively and procedurally.[12] Through

[12]For the legitimate child in Connecticut, the right to receive support, to inherit, or to benefit from its father's social security, unemployment compensation, workmen's compensation or wrongful death claims, is established at birth, C.G.S. Sections 17-320, 45-274, 31-234, 31-306 and 42 U.S.C. Section 402d. In addition, any child is entitled from birth to support from the town in which he or she resides if such support is necessary, C.G.S. Section 17-273. State law also obligates both parents to

it, only the mother of an illegitimate child can be forced, on pain of incarceration, to reveal the identity and whereabouts of the other parent of a child. Through it, the mother of an illegitimate child can be forced to utilize the courts to seek financial support for the child even if she deems it inadvisable, but no law imposes a similar obligation on any other parents. There is no other Connecticut statute, and thus none applying to any other category of parents, which makes a natural parent's handling of a child's financial interests grounds for an interruption of the parental role. Nor does Connecticut move in other ways to protect what it deems the general financial interests of children from the judgments of their parents.

In short, the other statutes relating to support of minor children are designed and function to aid the parent having custody in defraying the cost to her or him of supporting a child, and empower the State

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support an illegitimate child; C.G.S. Section 17-320. In addition an illegitimate child is also entitled to unemployment compensation benefits, workmen's compensation benefits and wrongful death benefits; *Weber v. Aetna Casualty and Surety Co.* 406 U.S. 164 (1972); *Levy v. Louisiana* 391 U.S. 68 (1968); and *Glona v. American Guarantee and Liability Ins. Co.* 391 U.S. 73 (1968). An illegitimate child is not, however, entitled to inherit from its father, C.G.S. Section 45-274, and see *Labine v. Vincent* 401 U.S. 532 (1971).

Both parents are guardians of a legitimate child and each has equal authority; C.G.S. Section 45-43; guardian being defined as: "the person who has the custody of the person of the minor and has the duty and the authority to make major decisions affecting the welfare of the minor" PA 156 Sect. 19 (1973.) Only the mother is guardian of an illegitimate child, however, regardless of whether paternity is acknowledged or established; *Ibid.* Jurisdiction over petitions to remove a parent as guardian and petitions for appointment of a guardian is in the Probate Courts, *Ibid.* The mother of an illegitimate child remains its guardian unless and until removed as such by the Probate Court; *Lewis v. Klingberg* 100 Conn. 201 (1923). See, generally, "Family Law Jurisdiction: Its Connecticut Background", 26 Conn. B.J. 302 (1952).

Welfare Department to act only to protect its own interest. Section 52-440b, on the other hand, singles out a narrow class of parents, mothers of illegitimate children, and requires them to take affirmative actions even if they feel those actions would not be beneficial to their children and empowers the Welfare Department to act against the mothers even if it is in conflict of interest with the children. And it is enforced against an even narrower subclass, welfare recipients and mothers whose children have guardians other than themselves. Thus the statute singles out for special treatment illegitimate children and their mothers.

In determining whether governmental action at the federal, state or local level violates the equal protection principle, courts have applied standards of review ranging from lenient to stringent. See "Developments in the Law – Equal Protection", 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "reasonable relationship" test: (2) the strict "scrutiny" test met only by demonstration of a "compelling state interest", applicable when the action invokes a "suspect" criterion or impinges upon a "fundamental right". In recent commentary and judicial opinion jurists have noted the emergence of "an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause" *Eslinger v. Thomas* 476 F.2d 225, 231 (4th Cir., 1973). This approach focusses on the substance of the governmental interest sought to be served and calls for assessment of the reasonableness of the means by which the regulation in question attempts to advance the identified interest. See Gunther, "The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972); *Weber v. Aetna Casualty and Surety Co.* 406 U.S. 164

(1972); *Green v. Board of Education* 473 F.2d 629, 633 (1973, 2nd Cir.).

With respect to the applicable standard of review in this case, the position of appellants is four-fold: (1) the statute, in applying only against families with illegitimate children established a suspect classification for which no justification exists, (2) the statute, in applying against mothers but not fathers, establishes a second suspect classification, sex, which it fails to vindicate, (3) the statute, by applying to impinge the fundamental rights–parental control and privacy–of a politically powerless minority–mothers of illegitimate children, must be subjected to close scrutiny, and (4) the classifications utilized by the statute are not rationally related to any legitimate state purpose.

A. The statute, operating on the basis of legitimacy, establishes a suspect classification.

An explicit affirmation by this Court of the suspect nature of legitimacy classifications would come as the logical culmination of its recent decisions reviewing such classifications. Thus, in *Levy v. Louisiana* 391 U.S. 68 (1968); *Glona v. American G and L Ins. Co., supra; Weber v. Aetna Casualty and Surety Co., supra;* and *Gomez v. Perez* 409 U.S. 535 (1973), the Court has carefully examined the states' various rationales for making a child's illegitimacy of birth a disqualification for receipt of statutory entitlements by the child or mother, or for state enforcement of paternal support. In each case, the Court has found such classification by legitimacy to be unconstitutional. The intimation of suspect status in *Weber* 406 U.S. 164, 176, n.14, moreover, and the *per curiam* character of the *Gomez* opinion would seem to confirm an ineluctable movement toward such a declaration of suspect status.

In *Labine v. Vincent* 401 U.S. 532 (1971), the Court upheld a classification based on legitimacy for purposes of intestate succession from the father. The subsequent opinion in *Weber*, though, underlined the need informing *Labine* for "prompt and definitive determination of the valid ownership of property left by decedents", 406 U.S. 164 at 170, (quoting *Labine v. Vincent* 229 So.2d 449, 452 (La. App. 1969)). Given the impossibility of discovering the intestate decedent's actual intent and the temporal pressures noted in *Weber* to settle the status of the intestate landowner's property, the imperfect classification by legitimacy under review in *Labine* constituted the best possible under the circumstances. The intestacy situation thus comported with the demands of strict scrutiny, and *Labine* need not be overruled should the Court establish illegitimacy of birth as a suspect classification.

The claims of appellant illegitimate children and their mothers to suspect classification characterization appears to turn on their comprising a politically impotent outgroup.[13] Appellants' virtual exclusion from legisla-

[13]Hitherto the Court has found three types of classifications to be suspect: race, alienage and nationality; *Brown v. Board of Education* 347 U.S. 483 (1954); *Graham v. Richardson* 403 U.S. 365 (1971); and *Korematsu v. U.S.* 323 U.S. 214 (1944). Thus no statutory classification on these bases can be upheld unless it is a perfect fit: neither over nor underinclusive, and designed for the promotion of a legitimate purpose. See, e.g. *Loving v. Virginia* 388 U.S. 1 (1967). There may be an additional exception for instances in which an emergency need for immediate classification exists: *Hirabayashi v. U.S.* 320 U.S. 81 (1943). See Note "Mental Illness: A Suspect Classification?" 83 Yale L.J. 1237 (1974).

The Court has never explicitly designated the determinative criteria for establishing race, alienage and nationality as suspect classifications, but the repeated focus on perfection in classification suggests that a determination has been made that the legislative process is peculiarly untrustworthy when employing these three classifications and, hence, its products must be

tures is a matter for judicial notice. Their "outsider" status as concerns the political process, furthermore, seems evident on the basis of: (1) their miniscule percentage of the voting population; see 7 Int'l Ency. Soc. Sci. 85, 87-89 (1968), Statistical Abstract of the United States, 12, 54, 382 (1973); (2) their general membership in the underprivileged and thus politically weak groups; *Ibid*, 54; (3) their insularity from other social groups which might be expected to raise claims on their behalf; see Young, *Out of Wedlock* (1954) 1-3,

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carefully scrutinized. One cause for such distrust lies in the self-interest of legislators when classifying along these lines. For example, since the great majority of legislators have invariably been white, one may expect that racial classification which necessarily involve comparative generalizations along racial lines, and hence cost-benefit differences, will generally deviate from non-classifications in ways redounding to the interests of white legislators; See, Note, supra. 83 Yale L.J. 1237, 1245-1250. The second seemingly necessary criterion for status as a suspect classification appears to be the political impotence of the disadvantaged group. See Harold Lasswell, *Politics: Who Gets What, When How?* (1958) at 13-27, and Note, supra. 83 Yale L.J. 1237 at 1250-1, 1254-8. A third criterion, immutable characteristics determined at or by birth, has been cited by the Court: *Johnson v. Robison* ___ U.S. ___, 39 L.Ed.2d 389 (1974). Since alienage is not immutable, that clearly is not necessary to find a suspect classification.

On these criteria, appellants, both mothers and children have a strong claim to suspect classification characterization. As a leading authority has summarized:

> It was natural that men, as legislators, would have limited their accidental offspring's claims against them both economically and in terms of a family relationship, especially since the illegitimate mother often did not equal their own. Moreover, their legitimate wives had an interest in denying the illegitimates' claim on their husbands, since any such claim could be allowed only at the expense of the legitimate family. Against these forces have stood only the illegitimate mother and the helpless child. It is thus not surprising that our laws are inconsiderate of the child's interests.... In nearly all instances, classification based upon the criterion of legitimacy alone either is not related to a proper legislative purpose or, if a proper purpose is in

114-5 and 7 Int'l Ency. Soc. Sci. supra., 579-581, and (4) their repeated victimization by imperfect classifications; *Weber v. Aetna Casualty and Sur. Co., supra*, (and other cited supra. p.35). See also *Frontiero v. Richardson* 411 U.S. 677 (1973).

The classifications of Section 52-440b thus necessitate strict scrutiny. Is the statute over-inclusive and/or under-inclusive? Is it justified by an emergency compelling an immediate classification? These questions must be answered against a background of the purposes which the statute may be designed to serve: (1) recoupment by the state of welfare moneys paid out for the support of dependent children, and (2) the interests, principally the financial interests, of the children in establishing paternity.[14] Considered against either of these purposes, the classifications made by Section 52-440b are such a poor fit as to require the statute's demise.

1. Recoupment of AFDC benefits.

The categories set up by Section 52-440b are not designed to fit a statutory purpose of recoupment in

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the picture, such a classification is grossly "over or under inclusive."

H. Krause, *Illegitimacy: Law and Social Policy* (1971) at 83-4.

[14] The District Court, accepting Appellees' position, found that the statute was principally designed for the latter purpose; 365 F. Supp. 65, 77. But, there is no support for that view in the legislative history, state court construction or even the administrative rules for its application. See footnote 3, ante, p. 5. The enforcement classifications make no sense when viewed against that purpose, see pp. 32-33 infra. State courts dismissed petitions filed under the statute when it became clear that the state had no financial interest even though the child clearly did have such an interest; *Norton v. Bilodeau* (9th Cir. April 2, 1973); *Norton v. Abascal* (Ibid) (Appendix to Children's Brief). And all of the relevant provisions of the Connecticut State Welfare Manual are in the Chapter concerned with recoupment rather than that concerned with Child Welfare (Conn. State Welfare Department Manual, Vol. 2).

several ways. The statute establishes a draconian program aimed at recoupment of benefits by requiring mothers of illegitimate children to identify, locate and pursue the father for support, but neither it nor any other statute or regulation establishes such a program with regard to deserting fathers of legitimate children, compare *James v. Strange* 407 U.S. 128 (1972), and *Rinaldi v. Yeager* 384 U.S. 305 (1966).[15] Furthermore, the obligation to disclose fathers' names and prosecute paternity actions applies, facially, to all mothers of illegitimate children, not just welfare recipients. And the enforcement provisions of Section 52-440b apply to at least one group of mothers from whom a *recoupment purpose* would be irrelevant; cases in which a guardian or *guardian ad litem* has been appointed but the child does not receive welfare benefits. Fourth, the statute is not by terms limited to those mothers who are able to name the fathers, nor does it exclude instances in which the father could plead the running of the statute of limitations as a defense to a paternity action. Finally, the statute will involve pursuing some fathers not financially able to pay and thus again sweeps too broadly. See *Linda R.S. v. Richard D.* 410 U.S. 614 (1973).

[15]There is, of course, a NOLEO program dealing with deserting parents of legitimate children, but it is far less coercive that Section 52-440b; Conn. State Welfare Manual Vol. 1 Section P-3919 (set out in the Appendix to this Brief). There is a choice of courses of action and no quasi-criminal penalties in P-3919.

2. Financial interests of the children.

Even if Section 52-440b did advance the financial interests of illegitimate children,[16] its classifications are so far from perfect embodiments of that purpose as to cast doubt on the bona fides of that professed purpose. First, in applying only to mothers of illegitimate children it is once again underinclusive, Cf. *James v. Strange, supra.* Second, in applying to many mothers, including appellants, where the child's overall best interests will or may not be advanced by disclosure, the statute is overinclusive; See, *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 39 L.Ed.2d 52. Finally, the statutory sanctions of jail and fine operate directly contrary to the child's interest in every case; see e.g. *Jackson v. Indiana* 406 U.S. 715 (1972).

In applying to cases in which neither the state nor the child has any substantial interest, such as where the mother is perfectly capable of supporting the child by herself, or where the mother already has in her possession a signed acknowledgement of paternity, the statute is also overinclusive and unnecessary. Finally, in compelling the prosecution or a paternity action where the Commissioner of Welfare has the power to bring such an action in his own name or where the mother

[16]In many cases, the child's financial interests will not be affected by Section 52-440b: where the putative father is not amenable to process or is indigent, or where the child would by necessity remain a recipient of AFDC even with parental support. Additionally, litigation of a paternity action runs the risk of a finding of nonpaternity, which would cut off any chance the child had of receiving benefits through its father, a situation substantially worse than leaving the question open. Thus, even in purely financial terms, the statute will often fail to assist the child. And in terms of a child's other interests, maternal supervision and harmony, avoidance of public humiliation and so on, the statute is devastating, see Children's Brief.

has an acknowledgement of paternity in her possession, the statute is also overinclusive and unnecessary.

Nor does the record disclose any emergency requiring that a rough classification be attempted. Nor does it show that the classification according to legitimacy set up by Section 52-440b is the best practicable embodiment of either a state policy of recoupment of AFDC benefits or of a state policy of advancing the general interests of children through the provision of mechanisms to secure support for them; compare *Labine v. Vincent*, 401 U.S. 532. Section 52-440b thus meets neither of the exceptions to the rule that statutes establishing suspect classifications violate equal protection. Accordingly it must be declared unconstitutional.

Furthermore, it may well be that the true purpose of Section 440b is punitive; it penalizes appellants solely because they have borne children out of wedlock. This inference is supported by the irrationality of the classifications when measured against other possible purposes. See e.g. *James v. Strange* 407 U.S. 128, 142. Certainly a retributive purpose is not permissible: it penalizes appellants because of a status; see *Robinson v. California* 370 U.S. 660 and *U.S. Department of Agriculture v. Moreno* 413 U.S. 528 (1973).

B. The statute, because it operates to infringe a fundamental right – parental control of family decisions – must be subjected to close scrutiny.

The Court has often indicated a flexibility in its standard of "rational" classification according to the identity of the disadvantaged class; see e.g. *Reed v. Reed* 404 U.S. 71; *U.S. Department of Agriculture v. Moreno* 413 U.S. 528, 534 (1973). It has also scrutinized classifications when the nature of the

interest of which the disadvantaged class alleges deprivation is at least substantial and probably "fundamental"; *Eisenstadt v. Baird* 405 U.S. 438 (1972), *Dandridge v. Williams* 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). And see generally; *Dunn v. Blumstein* 405 U.S. 330, 335 (1972); *Village of Belle Terre v. Boraas* ___ U.S. ___ 39 L.Ed.2d 797, 807-8 (Marshall, J, dissenting); Gunther, *Forward* 86 Harv. L. Rev. 1.

Even if illegitimacy were not a suspect classification, it is quite clear that the Court has regularly probed intently the rationality of statutory classification based on the illegitimacy of the statutory object, and such classifications have been struck down with the single exception of the intestacy situation. As noted above, classifications disadvantaging mothers of illegitimate children are equally deserving of scrutiny as classifications disadvantaging the children. And a facially general statute which can be enforced only against welfare recipients should also be scrutinized carefully to determine whether legitimate state purposes are advanced by the limited enforcement classification; *Rinaldi v. Yeager* 384 U.S. 305; *Shapiro v. Thompson* 394 U.S. 618.

Section 52-440b threatens the "intimate familial relationship between a child and his own mother", an interest found so probative by the Court in *Levy v. Louisiana* 391 U.S. 68, because enforcement of this law may result in separation of mother and child and will undoubtedly put a severe strain on their relationship, Deposition of Solnit, *passim.* (A. 62-71) The implications for the appellants' freedom of self-determination, set forth in detail in Section III infra, also demand a high standard of review; Cf. *Eisenstadt v. Baird* 405 U.S. 438.

The District Court argued that coercion of appellant mothers was necessary to secure the equal access to

support payments due the children under C.G.S. Section 17-320, citing *Gomez v. Perez* 409 U.S. 535. But nothing in *Gomez* supports the invasion of equally fundamental rights of the appellant mothers. On the contrary, *Gomez* was concerned with failure of the state to provide adequate and equal procedures to assist the mothers in obtaining support from the fathers. Thus, a more logical extension of the *Gomez* holding would be to require states to increase the statute of limitations in paternity actions so that the father's obligation to support could not be cut off by the running of an essentially arbitrary period of time.

The socially disadvantaged character of the classes affected by Section 52-440b was established by the defendant; A. 56-61. Thus, as concerns this group of illegitimate children and their mothers, one cannot ignore the punitive impulses, and hence the extent to which ostensibly permissible state objectives may only mask "a bare congressional desire to harm a politically unpopular group" *U.S. Department of Agriculture v. Moreno* 413 U.S. 528.

Accordingly, even if the Court is reluctant to establish strict scrutiny as the test for all legitimacy classifications, this particular legislative classification should be held to an exacting standard of review. The defects in classifications of Section 52-440b have been discussed. Clearly under this demanding standard of review, the statute does not pass muster.

C. The statute, fails to vindicate its classification based on sex.

Section 52-440b also establishes an unconstitutional classification according to sex by subjecting only *mothers* to its requirements and concomitant penalties.

Child support is an obligation enforceable against either parent, whether the child be legitimate or not; C.G.S. Section 17-320. Whenever there is one present and one absent parent, the present parent may be a source of information leading to the locating of the other parent and enforcement of the child's right to support from the absent parent. There is no reason to suppose that fathers would be any less helpful than mothers. Either of the purported purposes of the statute would be more fully achieved by a broader classification compelling fathers as well as mothers to cooperate in divulging information as to the identity and/or whereabouts of the absent parent. The connection between the classification and either permissible goal is irrational. *Reed v. Reed* 404 U.S. 71 (1971). Nor is the classification saved by either an emergency need for immediate classification or practicable perfection. It therefore violates equal protection.

D. The statutory classifications are not rationally related to any legitimate state purpose.

Section 52-440b does not even survive the least stringent equal protection test, whether the discriminations set up rationally further some permissible state purpose; *Yick Wo v. Hopkins* 118 U.S. 356 (1886); *McGowan v. Maryland* 366 U.S. 420 (1961). Appellants submit that the State has invidiously discriminated against them, quite apart from any power to regulate parental relationships generally.

It may be, as the District Court thought, that there is a rational relationship between enforcement of disclosure of identity against welfare recipients only, and the permissible state purpose of recoupment of welfare benefits, 365 F.Supp. 65, 82. But there is no reason to provide sanctions of jail or fine to mothers of

illegitimate children for their failure to assist in the identification of legally liable relatives but permit all other parents to go unpunished for the same failure. Yet, viewed with the other Connecticut statutes and Welfare Department regulations, that is precisely the effect of Section 52-440b. As Justice Powell wrote for the Court in *James v. Strange:*

> State recoupment laws, notwithstanding the state interests they may serve, need not blight, in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under law. 407 U.S. 128, 142.

This statute, in applying special procedures to a subcategory of the persons to whom the legitimate purposes of the statute might reach, embodies precisely the same elements of punitiveness as the statute struck down in *James v. Strange*. It is a violation of equal protection in this respect as well.

III.

CONNECTICUT GENERAL STATUTES SECTION 52-440b VIOLATES APPELLANTS' CONSTITUTIONALLY GUARANTEED LIBERTY

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder. *Prince v. Massachusetts* 321 U.S. 158, 166 (Rutledge, J).
>
> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations. *Pierce v. Society of Sisters* 268 U.S. 510, 535 (McReynolds, J).

Thus have two Justices defined the "liberty" guaranteed against state interference without due process in the area of regulation on family decision-making.

May a state, constitutionally, require all mothers of illegitimate children, by threat of public humiliation, fine and/or imprisonment (and the concomitant prospect of breaking up the family) to disclose the name of the putative father of their children and prosecute bastardy actions? Section 52-440b requires a mother to do so even if she has determined that such disclosure and/or prosecution would not be in the best interests of her child and herself. Appellant mothers submit that their right to make this decision, whether or not to prosecute a bastardy action, is protected from arbitrary and unnecessary interference by the constitutional zone of privacy, and that Section 52-440b constitutes arbitrary and unnecessary intereference.

A. The right of parents to determine family actions and the integrity of the family are within the constitutionally protected zone of privacy.

The right of parents to determine the care of their children has long been recognized as constitutionally protected liberty; *Meyer v. Nebraska* 262 U.S. 390 (1923); *Pierce v. Society of Sisters* (supra); *Prince v. Massachusetts* (supra). The integrity of the family unit has likewise been protected; *Griswold v. Connecticut* 381 U.S. 479; *Stanley v. Illinois* 405 U.S. 645 (1972), as have the right to determine, without state interference, such matters as sex, child-bearing and marriage;

see e.g. *Skinner v. Oklahoma* 316 U.S. 535; *Loving v. Virginia* 388 U.S. 1; *Eisenstadt v. Baird* 405 U.S. 438; and *Roe v. Wade* 410 U.S. 113 (1973). A right which is within the constitutionally protected "zone of privacy" can be infringed only where there is a compelling state interest; *Roe v. Wade, supra,* 153-156, and then only by statute "narrowly drawn to express only the legitimate state interests at stake"; *Roe v. Wade,* Ibid. It must not be unnecessary, arbitrary or capricious; *Cleveland Board of Education v. LaFleur* ___ U.S. ___ 39 L.Ed.2d 52. The burden of proving that such compelling interest exists is on the state, *Roe v. Wade* 410 U.S. 113, 156.

The zone of privacy protects relationships including doctor-patient relationship; *Roe v. Wade, supra. Doe v. Bolton* 410 U.S. 179 (1973), and the marital relationship; *Griswold v. Connecticut, supra.* It also protects individuals; *Eisenstadt v. Baird, supra.* Where the privacy of a family is concerned, what is protected is the parent's right to decide questions affecting the family: see *Pierce v. Society of Sisters, supra; Stanley v. Illinois, supra:* at least until the children are old enough to formulate their own views on the subject; see *Wisconsin v. Yoder* 406 U.S. 205, 229 et seq., and *Matter of Seiferth* 309 N.Y. 80.[17]

[17]Although the Constitutional privacy doctrine is now well established, it may be important to look at its theoretical foundation to show that appellants' right to decide whether to bring a paternity action is within its scope. In the *Griswold* case, a plurality of the Court defined the constitutional right of privacy as an extension or "implicit in the concept of ordered liberty". Thus the extent of the right may be ascertained by looking to the values implicit in the more specific guarantees of the Bill of Rights. See also *Cleveland Board of Education v. LaFleur* ___ U.S. ___ 39 L.Ed. 2d 52.

The right claimed by appellants is closely related to First Amendment values in at least two ways. First, the right to petition for redress of grievances including the right to access to courts implies a corresponding right not to resort to courts if she does not believe that to be in her best interests. Second, the

There is no previous decision of this Court which deals squarely with the issue presented here. However, in *Cleveland Board of Education v. LaFleur* ___ U.S.

right to associate freely implies some right to prevent the public disclosure of that association where such disclosure might impair the right. Cf. *Bates v. Little Rock* 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama* 357 U.S. 449.

Appellants' claims are closely related to Fourth Amendment values in that Section 52-440b is an intrusion into a normally private area without prior due process, for the purpose of seizing evidence for litigation. Additionally, it can be used to force mothers to disclose the most intimate details of their sexual life in a public forum, an unreasonable seizure of evidence per se; *Griswold v. Connecticut* 381 U.S. 479. Due to the immunity granted by C.G.S. Section 52-435b, appellants do not claim that 52-440b infringes their rights under the Fifth Amendment, though it is related in that the enforced disclosure would subject them to public obloquy and scorn, a result very likely as injurious as prosecution.

Finally appellants' claims are closely related to the values underlying the Eighth Amendment's guarantee against cruel and unusual punishment. A sentence of up to one year in jail and a $200.00 fine, while not usual in contempt proceedings, see C.G.S. Section 6-70 (coroner's inquest, maximum sentence of 30 days for contempt) or Section 7-270 (City Board of Police Commissioners, maximum sentence of 30 days for contempt), is also not unheard of, see C.G.S. Sections 2-46-2-48 (Investigation of General Assembly maximum sentence of one year). It is, however, totally unknown in any other context relating to a parent's obligation with respect to the intangible interests of her child; compare *Trop v. Dulles* 356 U.S. 86 (1958). Appellants also seek to protect from public exposure a status, illegitimacy, which while not otherwise criminal, could subject them to humiliation; *Robinson v. California* 370 U.S. 660. Finally appellants submit that a significant purpose of the statute is to punish them for the status of their children.

The Ninth Amendment also formed part of the basis for the Constitutional right of privacy enunciated in *Griswold* (see especially opinion of Goldberg, J, concurring, 381 U.S. 479, 488). The purpose usually ascribed to the Ninth Amendment was to make plain that the enumeration of personal rights in a Bill of Rights did not alter the basic intent that the *Federalist* No. 84

—, 39 L.Ed.2d 52 (1974) the Court defined constitutional privacy to include "freedom of personal choice in matters of marriage and family life", 39 L.Ed.2d 52, 60, in striking down forced maternity leave provisions which required pregnant school teachers to terminate their employment without regard to their ability to continue working or to the beginning or end of a school term. Thus the Court recognized the rights of women not only to determine when they would bear children, but also to be free from arbitrary or capricious regulations activated by that decision but made by the state with regard to other aspects of their lives. And in *Stanley v. Illinois* 405 U.S. 645 the Court protected families which, like those of appellants contained an illegitimate child, from arbitrary state action, finding "family integrity" to be consitutionally protected.

Several lower courts have intimated that the right of parents to make decisions as to their children's best interests lie within the constitutionally protected zone of privacy; *Merriken v. Cressman* 364 F.Supp. 913 (E.D. Pa. 1973); *Haley v. Troy* 338 F.Supp. 794, 804 (D. Mass. 1972); *In re Stuart* 114 F.2d 825 (D.C. Ct. App. 1940). And see Newman, J. concurring below 365

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with 1 Annals of Congress 439 (Gales and Seaton) (Madison's explanation of the need for the Ninth Amendment). See, also Story, II, *Commentaries on the Constitution of the United States* 626-7 (5th ed. 1891). Another function was to make it clear that citizens were to be protected from the use of legal devices which had not yet been developed:

"It was preferred to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." Goldberg, J., concurring in *Griswold v. Connecticut* 381 U.S. 479, 488-9. The Ninth Amendment has not been authoritatively construed since the passage of the Fourteenth Amendment drastically altered the federal system. See generally Rhoads and Patula, "The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut 50 Denver L.J. 153 (1973).

F.Supp. 65, 85. In striking down a "voluntary" school program designed to screen student personalities to predict future drug use, by use of a detailed set of intimate questions the *Merriken* court held:

> These questions go directly to an individual's family relationship and his rearing. There probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child. This Court can look upon any invasion of that relationship as a direct violation of one's Constitutional right of privacy, 364 F.Supp. 913, 918.

Indeed, the only holding to the contrary is the majority opinion below. And it contains not one word of explanation nor any supporting authority.

All mothers of illegitimate children are faced with a difficult choice: whether to pursue the vague possibility of receiving support and/or other benefits from putative fathers through the channel of a paternity action, or to forego that vague possibility of financial benefit. A paternity action may entail public examination into all of the details of the mother's sexual life with resultant feelings of humiliation and worthlessness.[18] Even if successful, it may not be worth the price as, for example, if it causes the father to break off a relationship with the mother and child, or if the father is financially unable to support the child. And if unsuccessful, it would cut off any possibility of support or benefits from the father, a result not necessarily attending a case in which no paternity action is ever brought.

About seventy (70) per cent of mothers nonetheless voluntarily choose to disclose the father's name and bring a paternity action; Deposition of Mancini, (A. 112).

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[18] Affidavit of Kathrine Lopes, *passim* (SA 10.15).

Appellant mothers have chosen not to bring a paternity action, for reasons which reflected their interests and their children's interests.[19] Appellee did not dispute their contention that paternity actions would not advance their children's interests. Appellants submit that where a decision is as close to the core of the parental function as this, and where the competing considerations are as complex as these, their decision must be respected. No decision of this Court upholds an invasion of the parental function as sweeping and crucial as that accomplished by Section 52-440b. On the contrary, in all cases presenting questions even nearly this basic to family life, the Court has protected parental liberty; *Stanley v. Illinois* 405 U.S. 645; *Skinner v. Oklahoma* 316 U.S. 535; *Loving v. Virginia* 388 U.S. 1; *Pierce v. Society of Sisters* 268 U.S. 510; and *Meyer v. Nebraska* 262 U.S. 390.

The Constitutional right of privacy is a doctrine designed to prevent just such new invasions of privacy as 52-440b entails. In his pioneering book, *Privacy and Freedom* (N.Y., Athaneum, 1967) Professor Alan Westin summarizes:

> Thus if we look at leading cases in the liberty area decided by the Supreme Court in the past decade, we find that the Justices, intuitively rather than explicitly, have been laying out many of the basic elements of a functional definition of constitutional privacy. The functions of autonomy, evaluation, release and limited communication have each been protected under the new cases, and the Court has dealt with each of the four basic states of privacy; solitude, intimacy, anonymity and reserve. p. 385.

Unquestionably the rights of appellant mothers to control the decision as to whether to bring a paternity

[19]The evidence concerning the particular reasons for their refusal is summarized in the Statement of Facts, pp. 6-7 supra.

action on behalf of their children by deciding whether to divulge the name of the putative father is to use the functions of autonomy and limited communication to protect the basic states of privacy, particularly of anonymity and reserve. Thus their claim is within the "zone of privacy" protected by the First, Fourth, Eighth, Ninth and Fourteenth Amendments to the Constitution.

There are, of course, limitations to the extent of the constitutional zone of privacy. Limits may be imposed either by opposing constitutional rights or by "compelling interests"; *Roe v. Wade* 410 U.S. 113, 153. "Compelling interests" may include the interests of the individual child; *Stanley v. Illinois, supra,* or of the public; *Jacobson v. Massachusetts* 197 U.S. 11. Appellants submit that neither an opposing constitutional right nor a compelling interest is served by Section 52-440b.[20]

There is no constitutional right in opposition to Appellant mothers' exercise of parental decision-making.[21] Nor are the financial interests which,

[20]The appellee did not plead compelling interests, although it is his burden to prove that any such interests exist and are rationally advanced by the statute; *Roe v. Wade* 410 U.S. 113, 156.

[21]The children have a statutory right to support from their mothers or if the mothers are unable to provide such support, from their fathers or the town in which they reside; C.G.S. Section 17-320, 17-273. And they have a constitutional right to equal treatment under the support laws regardless of their illegitimate status; *Gomez v. Perez* 409 U.S. 535. But there is no constitutional right to receive support. Nothing in *Gomez* supports the claim that the child's interest in financial support may be presumed to be greater than the parent's constitutional right to direct the child's upbringing; it was concerned rather with state law impediments to the mother's right to establish the child's right to receive support.

Although the Court has ruled that in case of direct conflict of interest at the most basic level, the right to life, the mother's

Appellee asserts, oppose the mother's rights compelling interests; *Shapiro v. Thompson* 394 U.S. 618 (1969).[22] Nor does any interest of the child in securing and receiving support from its father conflict with the mother's interests, since the function of support laws is to assist the parent having custody in providing for the child's needs; see e.g. *Pelak v. Karpa* 146 Conn. 370. Connecticut does not seek to regulate in any other circumstances or against any other classes of parents, parental decisions which may adversely affect their children's financial interests, in apparent recognition of the importance of parental independence.

Cases imposing on parents the duty of cooperating with other types of public policies are not controlling here. In *Jacobson v. Massachusetts* 197 U.S. 11, the Court upheld a state law making vaccinations compulsory. The rationale for decision was that there was a particular public interest in preventing the spread of disease which justified over-riding any private interests to the contrary. In the language of later cases, the public health constitutes a compelling state interest.

In *Prince v. Massachusetts* 321 U.S. 158, the Court upheld a criminal conviction of a parent for violation of the child labor laws over a claim that the First Amendment's free exercise of religion clause prevented the state from so criminalizing religious activity, in that case the selling of religious tracts. In so ruling, the court relied upon the validity of the child labor laws

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right must take precedence over the child's, *Roe v. Wade* 410 U.S. 113, 163-4, appellant mothers do not rely on an assignment that their right to privacy is greater than their children's right to support. Rather, appellants contend that the state may not presume that those interests are in conflict.

[22]The financial interest opposing their rights is that of the state and not of their children; Introduction *supra*, pp. 12-14; Part II, pp. 31-34.

which found a public purpose sufficient to override any contrary private interests, see, e.g. *Sturges v. Beauchamp* 231 U.S. 320 (1913). The holding in *Prince* has been limited by later interpretation, *Sherbert v. Verner* 374 U.S. at 402-3, *Wisconsin v. Yoder* 406 U.S. at 230, and it is not clear that the decision in *Prince* would be upheld in light of the "compelling state interest" test now applicable to cases involving the constitutional right of privacy, see *Roe v. Wade* 410 U.S. 113, 153-6. *Prince*, in any case was concerned with the validity of a regulation upon the *activities* of minors though enforced against their guardians. It is hardly determinative of this case in which the state seeks to force mothers to act to protect what it believes to be the *abstract* interests of babies. See also *State v. Bailey* 157 Ind. 324; *Pierce v. Society of Sisters* 268 U.S. 510, 534; *Wisconsin v. Yoder supra*.

Nor do cases permitting the state to remove children from the parents' custody temporarily to affect vital medical procedures support defendant's position. See e.g. *People ex. rel. Wallace v. Labrenz* 411 Ill. 618, cert. den'd 344 U.S. 824 and *Jehovah's Witnesses v. King County Hospital* 278 F. Supp. 488 D. Wash., (1967). They impose no penalty on the parents and permit such removal only after individual due process hearing as to its propriety. See e.g. *Stanley v. Illinois, supra*.

All of these cases presented a clear, articulated and legitimate state purpose upheld where it could be characterized as "compelling". Section 52-440b has no such purpose.

Nor have Appellants, by applying for and receiving assistance under the AFDC program, waived their rights. On the contrary, the Social Security Act protects the rights of privacy and self-determination in setting out the purposes of the AFDC program; see Section I, supra, pp. 18-20. *Wyman v. James* 400 U.S. 309 (1971) is not to the contrary; it involved a genuine interest of

the children, freedom from physical abuse and maltreatment, whereas Section 52-440b is a recoupment statute or, at most is designed to advance the abstract interests of children. Even if Section 52-440b did advance children's interests, *Wyman* does not support Appellee since the *Wyman* regulation involved only the issue of welfare eligibility, and the Court expressly disapproved of the quasi-criminal sanctions found in this statute:

> We note, too, that the violation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. 400 U.S. 309, 317 (Blackmun, J.).

While conscientious and capable parents had nothing to fear from the visits upheld in *Wyman*, Section 52-440b coerces all of the members of one class of AFDC parents: mothers of illegitimate children. By removing their freedom of choice, it disadvantages all of them. And the invasion is neither limited nor minor.

B. The District Court erred in failing to find that the constitutional right of privacy includes a privilege against disclosure.

The areas of sexual conduct and procreation are unquestionably protected by the "zone of privacy"; *Griswold v. Connecticut* 381 U.S. 479; *Skinner v. Oklahoma* 316 U.S. 535; *Loving v. Virginia* 388 U.S. 1; *Eisenstadt v. Baird* 405 U.S. 438; *Roe v. Wade* 410 U.S. 113. The District Court, however, held that the privacy thus protected did not include any right to prevent disclosure, 365 F. Supp. 65, 75-78. Such a holding renders the right meaningless.

Wyatt v. U.S. 362 U.S. 525 (1960) cited by the District Court as precluding a privilege against disclosure is not in point. The Court held in *Wyatt* that the

common law marital privilege against testimony did not apply to prosecution under the Mann Act and that, given the legislative history of that act, it could not be claimed "voluntarily" by the wife. Not only did *Wyatt* precede *Griswold*, but the wife in *Wyatt* could make no claim that her privilege was necessary to protect her constitutional privacy right; *Caminetti v. U.S.* 242 U.S. 470 (1917). And *Wyatt* was concerned with the compulsion to testify in a criminal prosecution which under its circumstances was a compelling state interest, while Section 52-440b has no purpose other than compelling the disclosure for purposes of state usurpation of the parental role. The District Court's equation of prostitution with the bearing of a child out of wedlock again reveals the punitive purpose of Section 52-440b.

By holding that only the Fifth Amendment is a constitutional bar to compelled disclosures, the District Court ignored and undermined several decisions of this court finding such privileges in other rights "implicit in the concept of ordered liberty"; *N.A.A.C.P. v. Alabama* 357 U.S. 449; *Bates v. Little Rock* 361 U.S. 516; *Shelton v. Tucker* 364 U.S. 479; and *Watkins v. U.S.* 354 U.S. 178 (1957). All of these cases held that the First Amendment incorporates a right to prevent divulgences of some types of private information. A privilege against divulgence is essential to the constitutional right of privacy.[23] *Griswold* would be a hollow

[23] Other lower courts which have considered the question have uniformly concluded that the right to privacy does include some rights against disclosure, though they have differed on the ultimate results. See e.g. *Schulman v. New York City Health and Hospital Corp.* 346 NYS 2d 920 (appeal pending), which struck down a New York City Health Department regulation requiring the filing of a fetal death certificate following an abortion; *Roe v. Ingraham* 480 F.2d 102 (2d Cir. 1973) convening a three-judge court to determine, inter alia, whether a requirement that certain medical prescriptions must be registered with the State

shell if married couples could be compelled to testify in open court concerning their use of contraceptives.

There is no question that, for a woman to appear in court, be examined and cross-examined as to the names of persons with whom she had sexual intercourse, their address and other identifying information, and other details of her past sexual conduct, is a humiliating and degrading experience. Paternity actions, if contested are fraught with such humiliation.[24] Yet Connecticut has made it public policy to force all mothers of illegitimate children to undergo such humiliation if necessary to establish paternity even though neither mothers nor children may ever benefit from the result. Under Section 52-440b, Appellee forces mothers of illegitimate children to 1) identity the fathers in open court, including disclosure of any details deemed relevant to the prosecution of a paternity action,[25] 2) institute a paternity action and 3) "prosecute" a paternity action, including full testimony on any sexual matters which could be relevant to the inquiry.

Since these are highly private matters, the inquiry again turns on whether there is a compelling interest thus being advanced. In *Wyatt v. U.S.* 362 U.S. 525, the compelling interest was the administration of the criminal justice system. But, no compelling interest is advanced here.

Nor does the disclosure of illegitimacy to the Welfare Department at the time of an application for AFDC constitute a waiver of the privacy claim; it is under strict confidentiality and for the limited purposes of an AFDC application.

Department of Health violated the constitutional right of privacy, (preliminary injunction denied, 364 F. Supp. 536) and *Davidson v. Dill* 503 P.2d 157 (Colo.Sup.Ct. 1972) holding that privacy prevented dissemination of arrest records, where there was a later acquittal.

[24] See Affidavit of Katherine Lopes, A. 53-4.

[25] See, generally, Transcripts printed as an Appendix to the Children's Brief.

C. The statute invades the mother's privacy by forcing her to bring a lawsuit.

In addition to requiring appellants to disclose the names of their children's fathers, Section 52-440b also forces them to "institute" and "prosecute" bastardy actions. The term "prosecute" is not defined by statute, but its ordinary meaning is to commence an action to enforce a claim at law and to follow it to an ultimate conclusion, *Black's Law Dictionary* (4th ed., 1957) p. 1385 (citing *Service and Wright Lumber Co. v. Sumpter Valley Ry Co.* 81 Ore. 32, 152 P. 262, 264). Section 52-440b requires, then, that the mother of an illegitimate child bring a lawsuit against the man she believes to be the father, and to pursue it to an ultimate judgment whether successful or not, and whether or not she believes her family's interests will be thus advanced. No other Connecticut statute requires such action of any person.

The mother of an illegitimate child may wish not to "prosecute" a paternity action for a variety of reasons. One of the affidavits of record is from a woman who declined to do so for, inter alia, religious reasons (A. 44-5). For several of the women, the action might, under Connecticut practice have been abated as a harassment because the fathers already had signed acknowledgements of paternity, (A. 39, 40, 46) see *Hatch v. Spofford* 22 Conn. 485 (1853) and *Gaul v. Baker* 108 Conn. 173, 143 Atl. 51 (1928). Even if not abated, these actions would be at least a waste of court resources and at most possible grounds for an action for malicious prosecution. For others, the statute of limitations had already run, giving the putative father a valid defense; (A. 38, 52). One of the named appellants feared for her own mental stability if compelled to bring an action and testify (Dorothy Poe, A. 48). The other was reasonably certain the father would break off

his relationship with the child and would probably flee the jurisdiction making such an action a useles act, (Sharon Roe, A. 51).

Whether or not a given mother declined to bring an action for these reasons, there are always hazads in litigation to establish paternity; see *Gomez v. Pere* 409 U.S. 535. The most obvious is the possibility of a judgment for the defendant, which would prevert the child from receiving any benefits from the father at any time, a result which does not result from leaving the issue unclear. Compare *Ruocco v. Logiocco* 104 Conn. 585, 134 A 73 (1926) with *Hartford B and T Co. v. Prince* 28 Conn.Sup. 348, 261 A.2d 287 (1969). And see the Affidavit of Katherine Lopes, *passim*, (A. 3-4). Apart from simple contract actions, the results of litigation are speculative, in any case, see e.g. Dickens, *Bleak House*. Nor are the Appellants under a fiduciary obligation to pursue possible financial advantage for their children; compare *Potter v. Hiscox* 30 Conn. 508 (1862) in which a guardian appointed by the probate court was found negligent for failing to pursue a contract claim running in favor of his ward. Even if they were, the noncriminal failure to perform any fiduciary obligation in Connecticut does not cary a penalty of imprisonment or fine.

This Court has held that states may not coerce their citizens to take affirmative action where the refusal to do so is an exercise of a First Amendment right, *West Virginia Board of Education v. Barnette* 319 U.S. 624 (1943). Appellants submit that their refusal to prosecute paternity actions, a choice not to petition the courts for redress of grievances, is an exercise of a First Amendment right as was the children's refusal to saute the flag in *Barnette*.[26] Thus the statute also violates

[26]The requirement that mothers "prosecute" an action is not purely symbolic even though the Commissioner of Welfare or a Town supporting the child has power to bring an action in his or its own name under C.G.S. Section 52-440a, because that section only applies to cases in which the governmental unit has a financial interest in the action, and because the mother is treated as a hostile witness in actions brought under it. Nor would a purely symbolic function justify the statute; *West Virginia Board of Ed. v. Barnette*, (*supra*).

appellants' constitutionally protected liberty in that they have a First Amendment right not to take the action it seeks to require of them.

D. The statute violates due process.

As noted above, Section 52-440b imposes upon all mothers of illegitimate children the obligation (1) to disclose the name of the child's putative father and (2) to "prosecute" an action which will legally determine whether he is in law the father. If she does not do so, an official is empowered to file a petition in Circuit Court against her. Nothing in the statute prevents its use against a rape victim, or any woman who cannot identify the father. Nor does the statute exclude instances in which the child's best interests dictate that the father not be sought, or those in which the child's best interests are unclear.

The District Court concluded that it could not assume that the statute would be applied "woodenly", thus giving the trial judges unbridled discretion to decide when to apply it.[27] The Court made no attempt, to define the circumstances in which the statute might or could not be used, 365 F. Supp. 65, 74 n. 14.

[27]Connecticut permits removal of a child from the parent's custody if the parent is found to have neglected the child. "Neglect" is defined as:

> (A) Child may be found "neglected" who (a) has been abandoned or (b) is being denied proper care and attention physically, educationally, emotionally or morally or (c) is being permitted to live under conditions, circumstances or

Neither the statute nor the Welfare Department policy construing it, narrows its scope significantly; A. 72-92, 103-124. Nor do they provide standards for courts to use to narrow its scope. Nor does the mode of procedure adopted minimize the statute's impact on constitutionally protected areas.

Except for Section 52-440b, notice and the opportunity for hearing are prerequisites, under Connecticut law, for any proceeding interfering with the basic parental functions of control and custody of their children; see *Lewis v. Klingberg* 100 Conn. 201 (1923). Even where a petition of alleged neglect alleges an emergency situation requiring, for possible preservation of the child's life, immediate removal of the child from the parents' custody, hearing on the validity of such an

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association injurious to his well-being. C.G.S. Section 17-53.

Jurisdiction over petitions of alleged neglect is in the Juvenile Court. As Section 17-53 indicates, Connecticut does not make parental actions which are inimicable to a child's best interest financially a grounds for a finding of neglect. *In Re Stuart* 114 F.2d 825 (D.C. Ct.App. 1940), a mother was charged with neglect because she had deprived herself and her child of support payments rather than agree to a court order permitting the child's father the right to visit. The Court of Appeals reversed a finding of neglect based largely on her actions which had demonstrably deprived both herself and her child of the financial ability to lead the middle class life they had previously been accustomed to. The court, per Stephens, J, concluded:

> . . . .rights guaranteed by the Constitution (of parents) are not to be qualified either by legislative or judicial action having no reasonable relation to some purposes within the competency of the state. 114 F.2d 825, 832.

The experience in Circuit Courts subsequent to the District Court decision is that "wooden" application is precisely what occurs. (See Transcripts collected in the Appendix to the Children's Brief).

emergency order is held within ten days if the parent requests it. See C.G.S. Section 17-62(b).[28]

Where sensitive family issues are infringed, due process requires an individualized hearing to determine whether a proper purpose is advanced by the regulation of the particular family:

> Specifically, we must decide whether, considering the private interest affected and the governmental interest sought to be advanced, a hearing must be provided to one who claims that the application of some general provisions of the law aimed at certain abuses will not in fact lower the incidence of those abuses but will instead needlessly harm him. Cf. *Reed v. Reed* 404 U.S. 71; *Vlandis v. Klein* ante. In short, where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process clause requires the government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices. That, I think, is the import of *Stanley v. Illinois* 405 U.S. 645. *U.S. Department of Agriculture v. Murry* ____ U.S. ____, 37 LEd2d 767 (Marshall, J., concurring).

Parental control over a child's intangible interests, being a sensitive and constitutionally protected right, may not be infringed unless the state has first provided an individualized hearing before an impartial officer

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[28] Appellants are not here challenging the validity of the statute as enforced by guardians (who are not natural parents), because there must have been a decision, arrived at after due process hearing for a guardian to be appointed; C.G.S. Section 45-43. Nor do they challenge its application by guardians ad litem though it is hard to see when it would be so utilized; C.G.S. Section 45-54. And see *Clark v. Platt* 30 Conn. 282 (1861).

applying standards appropriate to the decision to be made; *Stanley v. Illinois* 405 U.S. 645.[29] And see *Bell v. Burson* 402 U.S. 535 (1971). The state cannot avoid the necessity for an individual hearing by use of an administratively simple irrebuttable presumption; *Vlandis v. Klein* 412 U.S. 441 (1973); *Frontiero v. Richardson* 411 U.S. 677 (1973). Nor can it do so by arguing that the statute is intended to be less sweeping than it reads; *Shelton v. Tucker* 364 U.S. 479.

As noted above, the purpose of Section 52-440b is not clearly articulated by the statute or its legislative history. Nor do Welfare Department policies include

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[29]The defendant seeks to justify Section 52-440b as an exercise of the common law doctrine of *parens patriae*. That is to misread history. *Parens patriae* was developed as an equity doctrine to permit the King to control the actions of guardians in an individual case in which it could be shown that the guardian had abused his trust. In *Butler v. Freeman* 27 ENG. Rep. 204 (Chancery, 1756), the court found that it:

> has general right delegated by the Crown as 'pater patriae' [to] interfere in particular cases for the benefit of such who are unable to protect themselves.
>
> The doctrine was clearly and narrowly limited, as the Court found in *DeManneville v. DeManneville* 32 ENG. Rep. 762 (Chancery, 1804):
>
> the Law imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred, in which the father was unable or unwilling to execute that duty, and farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those who cannot care of themselves; 32 ENG. Rep. 762, 767.

The current descendants of the *parens patriae* idea are, then, the neglect statutes and not a broad regulation of the roles of parents such as that attempted in Section 52-440b. The language of *Pierce v. Society of Sisters* is strikingly similar to that of the *DeManneville* case. This Court has refused to permit a broader view of *parens patriae* where it operates, as it does in Section 52-440b to deny due process; *In re Gault* 387 U.S. 1, 16 (1967).

standards to guide its use.[30] Nor has subsequent administration of the statute by the Circuit Courts evolved a construction sensitive to the constitutional rights involved.

The District Court upheld the statute by concluding that Connecticut had simply adopted the general policy of requiring all fathers to support their children, 365 F. Supp. 65, 74 n. 14. But the limited enforcement categories and absence of a similar program dealing with fathers of legitimate children belie that purpose. And the Commissioner has never articulated any such purpose, but has rather taken the position that the statute advances children's interests quite apart from any positive effect it may have on the state's finances. And finally, that formulation of the statutory purpose is to assume that the children's interests and the states interests will without conflict of interest, be advanced by uniform application of the support laws.

Where a statute implies the conclusion of fact on which its statutory purpose turns, the presumption may be erroneous, and the errors adversely affect an important interest, it violates due process; *Bell v. Burson* 402 U.S. 535 (1971); *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 39 LEd2d 52. Appellants submit that the lack of individual hearing to determine the best interests of the child invalidates Section 52-440b just as the lack of a hearing to determine the reasonable possibility of a judgment being entered invalidated the Georgia "accident security" system in *Bell*.

The statutory presumption is distinguishable from legislative decisions to control and protect society

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[30]Conn. State Welfare Manual Vol. I Section P-3460 (A. 10-12). Compare with New Jersey Manual of Administration, Division of Public Welfare, Section 2287 (also set out in the Appendix to this Brief).

through such requirements as universal school attendance, vaccination or prohibition of child labor, because in these latter areas regulations affect all members of society and have only incidental effects on the rights of particular classes. See e.g. *Prince v. Massachusetts* 321 U.S. 158. Nor is Section 52-440b like statutes which, by the nature of their legitimate purpose, require an ultimately arbitrary line-drawing; *Labine v. Vincent* 401 U.S. 532. And see *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 39 L.Ed.2d 52, 70-71 (Rehnquist, J. dissenting).

Section 52-440b is also constitutionally defective on another due process ground: it is far too broad. If a statute, incidentally regulating areas which may be constitutionally protected, is not carefully drawn to include only that area which the state has a legitimate interest in regulating and to exclude that which it does not, the statute must be found unconstitutional for overbreadth; *Shelton v. Tucker* 364 U.S. 479; *Roe v. Wade* 410 U.S. 113, 216 (Burger, Ch. J. concurring). The state may regulate the constitutional right of privacy only to the extent it has a compelling interest in doing so; *Roe v. Wade, supra.* See also *Talley v. California* 362 U.S. 60. The danger is that the overbreadth will permit infringement of important rights to go unchecked. In *Baggett v. Bullitt* 377 U.S. 360, 373, the Court held that "well-intentioned prosecutors and judicial safeguards do not neutralize the effects of a vague law." Neither do they neutralize the effects of an overly broad one. When a statute is either vague or excessively broad there is danger that the law will be applied to persons, such as Appellants, whose behavior is constitutionally protected, although the statute could constitutionally be applied to others within its theoretical reach. By leaving the courts or administrative agency without a standard for application, 52-440b opens the door to arbitrary and

discriminatory enforcement. That has already proven the case.

Thus the Court has held that "laws must provide explicit standards for those who apply them"; *Grayned v. City of Rockford* 408 U.S. 104, 109 (1972). The failure of a statute to provide explicit standards constitutes a violation of Due Process. See *Giaccio v. Pennsylvania* 382 U.S. 399 (1965). It is not sufficient for the courts and enforcement officers to adopt private standards for applying a statute; see *Ricks v. United States* 414 F.2d 1111 (D.C. Cir.Ct. 1968).[31]

The overbreadth of Section 52-440b has been delineated with regard to both of the statutory purposes in the discussion in Part II, *supra*. What is definitive for determination of validity under Due Process, however, is the lack of standards to guide its application. The lack of standards becomes glaring when viewed in connection with the state's interest in recoupment or conversely with its interest in promoting the welfare of children.[32] Indeed, only if the statute is

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[31] Appellants attacked Section 52-440b as unconstitutional on its face and as applied to them; Complaint, *passim* (A. 5) Affidavits, *passim* (A. 36-54). The District Court found the statute valid on its face, certified it as a class action and dismissed the action. This is thus not a situation comparable to that in *Broadrick v. Oklahoma* 37 L.Ed.2d 830 (1973), in which those who attacked the statute had no standing to make an overbreadth argument because their activities were unquestionably within the scope of a valid regulation. Appellants here, and the class they represent are being threatened with petitions which not have been brought under a properly narrow statute.

[32] In New Jersey, which has a similar statute, there are explicit standards contained in regulations to determine whether it is in the best interests of a child that a paternity action be brought on its behalf. (footnote 26 *supra*, p. 52). Since the regulations make this an agency determination, it is subject to the general fair hearing requirement; N.J. Admin. Code 10:81 -2.18. Conn. State Welfare Manual Vol. I Section P-3460 nowhere indicates that the children's or parents' best interest have any bearing on the decision whether a paternity action should be brought or whether a given mother should be compelled to divulge.

punitive does the lack of standards serve its purpose. And the statute lacks procedures designed to elicit the information which would be relevant to a decision on individual cases, under either of the two ostensible purposes.

Appeal is not a viable means of rectifying violations of the constitutional rights infringed by Section 52-440b. The damage to those rights occurs no later than the denial of a mother's claim of privilege. The penalties are so severe and so clearly opposed to the children's interests as to cause most if not all mothers who are attempting to protect their children to forego their own claims. And Connecticut's appeal procedures are notoriously slow and cumbersome; see e.g. *Ralls v. Manson* 1 Conn. Law Times 124 (D. Conn. No. H-205, 1974).

Furthermore, Connecticut fails to provide for the appointment of counsel to mothers facing petitions under Section 52-440b, much less for appeals. Since the mother could spend up to a year incarcerated as a result of a petition brought under the statute, the court hearing under Section 52-440b is a critical one requiring appointment of counsel; *In re Gault* 387 U.S. 1 (1967); *Argersinger v. Hamlin* 407 U.S. 25 (1972). The Circuit Court lacks power to appoint counsel in other than criminal matters; see C.G.S. Section 54-81a.

Section 52-440b is thus so strikingly deficient in its lack of standards and procedures designed to limit its application to those instances in which infringement of constitutional rights is justified by a compelling interest, that it violates procedural Due Process.

E. The state had other, less drastic means, available to safeguard the interests of illegitimate children.

An invasion of constitutionally protected privacy will not be sustained even where the purposes for the invasion are legitimate if there is available to the state an alternative means of fulfilling that purpose by means less drastic or sweeping than those chosen; *Eisenstadt v. Baird* 405 U.S. 430 (1972); *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 39 L.Ed.2d 52. Appellants recognize that there are instances in which the need to know the identity of the child's father may be a compelling interest of the child such as to justify requiring the mother to divulge such identifying information as she has about him. A child could, for example, have a rare disease which would be treatable if there were more information available about its genetic make-up. Such situations are not common, but Appellants concede that under those circumstances the state might, constitutionally, adopt some measures designed to safeguard such compelling interests of the child.

Such a statutory scheme, to be valid, would differ from Section 52-440b markedly. First, it would define its purposes clearly and adopt classifications and procedures rationally related to that purpose. Second, it could provide for action only by an individual or agency which could not be in conflict of interest with the child, rather than through the Commissioner of Welfare.[33] Third, it would provide that any necessary

[33]It is interesting to note the Commissioner's great concern for possible conflicts of interest between mothers and children, when he shows no such concern for possible conflicts between his own financial interests and the best interests of children. If one is to make assumptions about conflicts it would, on the whole, be safer to assume the parents to be less likely to be conflicted. Everyone would agree, for example, that a parent is

hearings would be held in a confidential setting such as the juvenile court, rather than in a public setting such as the Circuit Court. Fourth, it would provide for appointment of counsel for each of the parties to the proceeding. Finally, it would authorize punitive sanctions only if necessary to protect the child's compelling interest and where the sanctions demonstrably related to it.

In requiring mothers of illegitimate children to disclose the names of the putative fathers and to file and pursue paternity actions regardless of the consequences, Connecticut has taken over a parental function as basic to the concept of ordered liberty as any. It has done so without explicit and honest justification, in a drastic and sweeping fashion, and without any procedural safeguards whatever. And it has failed to produce any evidence that the statute has had any positive effect on any policy it claims to be pursuing. It is plainly an unconstitutional invasion of the families' privacy. .

CONCLUSION

For each of the reasons detailed above, the Court must reverse the ruling of the three-judge District Court

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more fit to make financial decisions for a child than is a bank to whom the parent owes money. But the Commissioner of Welfare stands in precisely the same relationship to the child as does such a bank.

and declare C.G.S. Section 52-440b unconstitutional and void. A remand in light of applicable constitutional principles may also be in order. Appellant mothers respectfully urge reversal.

Respectfully submitted

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APPENDIX A

Connecticut State Welfare Department Manual Vol. 1
Social Service Policies–Public Assistance

NEED REQUIREMENTS AND THE ASSISTANCE REPORT

Relative Support–AFDC Absent Parent Cases 3919

3919 *AFDC Absent Parent Cases*

1. Absence from the home may result from desertion, divorce or legal separation, involuntary separations occasioned by such circumstances as hospitalization, imprisonment or service in the Armed Forces.

   If continued absence of a parent from the home is given as a reason for the child's deprivation of parental support or care, the decision with respect to whether the absent parent should return rests with the family. The responsibility of the absent parent for support, however, is a part of the determination of eligibility and the Department has an obligation to assist in securing support.

   a. The mother who has applied for or who is receiving assistance is the *first* source of information.

   b. If the father's address is known, the worker will offer an opportunity for an interview.

2. The policy of the Department with respect to absence is:

   a. To emphasize that the rights of the individual families are respected in terms of what they want for themselves and their children but to explain that by law parents are required to support and care for their minor children to the best of their ability.

   b. To explain the supplementary nature of Public Assistance.

   c. To point out that steps will be taken to locate the father to determine his ability to support and help his children.

   d. To advise that when it is necessary to refer the case to the to the Resource Unit court action will be taken to determine the amount of support.

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Connecticut State Welfare Department Manual Vol. 1
Social Service Policies–Public Assistance

NEED REQUIREMENTS AND THE ASSISTANCE PAYMENT

Relative Support–AFDC Absent
Parent Cases–Procedures P-3919

P-3919 *Procedure Regarding Support–AFDC Absent Parent Cases*

1. Both State and Federal Law require that the Department notify the appropriate law enforcement official when assistance is furnished to children who have been

deserted or abandoned by a parent, whether the parents' address is *known* or *unknown*. Since this is a condition of eligibility, if the applicant or supervising relative in the active case refuses to have notification sent, the case is denied or discontinued, whichever applies.

NOTE: Parent refers to either the mother or the father, natural or adoptive. For the out-of-wedlock child, the father is limited to the acknowledged or adjudged father.

2. *Notice shall not be required* when it is established that the parent is:

   a. Incapable of providing support because;

      (1) he is receiving public assistance

      (2) he is in a penal or mental institution

   b. Currently contributing to the fullest extent possible;

      (1) There is no substantial change in the parent's circumstances since the last Court determination of ability to support

      (2) It is determined by a court or Family Relations Division of a Court that the parent's income and resources are so limited there is inability to contribute

   c. Divorced from the applicant by means of a divorce obtained in a Superior Court in Connecticut–

      In these cases, the Resource Worker at intake obtains the necessary information (date of divorce, court, amount of support order if any and whether his support payments are up to date). He then notifies the Family Relations Division of the appropriate Superior Court by letter advising the court of the granting of assistance to the applicant.

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3. *Referral to Family Relations Division of Circuit Court*

   When the address of the absent parent is known or unknown, the applicant or supervising relative is required, as a condition of eligibility, to either go to the Family Relations Officer or the Circuit Court and file a complaint for nonsupport *or* must furnish the Department of Welfare with the information regarding the absent parent. When the supervising relative chooses to give the Department the information the worker completes Form W-348A, "Absent Parent Information Sheet" and W-348C, "Applicant's Statement of Non-Receipt

of Support", in triplicate, and sends the original copy to the Circuit Court, one copy to the Resource Unit and the third copy is filed in the case record. The information given to the Family Relations Officer will enable him to determine what action is to be taken regarding nonsupport and to request the Prosecutor of the Circuit Court to issue a warrant for arrest if the facts given so indicate. This includes a divorced parent whose divorce was obtained in another state. Verification of the visit to the Family Relations Court if this is the method the supervising relative chooses to pursue, is required by telephone, in writing, or by the card given to the applicant by the Family Relations Officer. When the Resource worker obtains verification, he will refer the information to the worker for documentation in the case record.

If the supervising relative has been to the Circuit Court or has furnished the Welfare Department with the information regarding the parent within 30 days previous to applying for AFDC, and there has been no change in circumstances, she is not required to do so again. However, the Resource worker will verify, by telephone or in writing, that she has been to the Circuit Court within this time, or the information has been furnished to the Department.

In a case where the supervising relative refuses to name the putative father the above procedure does not apply. However, if she is unwilling to name the putative father she is informed that she is subject to be cited to appear before any Judge of the Circuit Court, be compelled to name putative father and to institute an action to establish paternity of the child.

When an application is denied or withdrawn, after referral has been made to the Family Relations Division of the Circuit Court, Form W-348B is sent to Resources which will in turn notify the Circuit Court stating the reason for the denial.

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NOTE: There may be active cases in which at the time of application for Public Assistance, the parent may have been incapacitated or institutionalized. Therefore, referral to the Family Relations Officer would not be appropriate. However, subsequently, the parent may get well, return to work and separate from the supervising relative. In case situations of this type, the worker is responsible for informing the supervising relative that as a condition of continuing eligibility, she must go to the Family Relations Officer to file a complaint for nonsupport or she must furnish the Welfare Department with the informa-

tion regarding the father. If the supervising relative has refused to name the putative father this is not required.

4. *Address of Parent Known*

When the award is granted, the Form W-348B is sent to the Family Relations Division of the Circuit Court to inform them of:

1) the case name and number

2) the amount of the award

3) the effective date of the award and

4) to establish an effective date for a Central Accounts Receivable Account

5. *Address of Parent Unknown*

a. If the applicant is unable to provide the current address, in addition to the worker instructing the applicant to go to the Family Relations Division of the Circuit Court or furnish the Welfare Department with information about the father, the Resource worker refers Form W-348 to the Location Unit of the Division of Central Collections of the Department of Finance and Control, after all efforts have failed to produce an address, by checking the following sources:

1) the parents of the absent parent

2) other relative

3) former employers

4) telephone and city directories

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b. Upon receipt of the Form W-348 appropriately completed the Location Unit of the Division of Central Collections of the Department of Finance and Control continues the investigation by clearing with:

(1) the Division of Unemployment Compensation of the State Labor Department

(2) the Department of Motor Vehicles

(3) the Connecticut State Police Bureau of Identification

c. The Location Unit Supervisor of the Division of Central Collections of the Department of Finance and Control will notify the District Resource Worker when the parent is located, and the Resource Worker will instruct the supervising relative to take

action in the appropriate court as a condition of continuing eligibility and follows up within a reasonable time.

(1) Supplementary reports will be submitted by the worker to the District Resource Unit on Form W-109 when there is new information or additional activity which is pertinent to the situation. Additional information about the absent parent which is secured in subsequent contacts with the spouse or collateral sources which gives more complete background information on the parent will be transmitted by the worker to the District Resource Unit, a copy of which will be mailed by the Resource Worker to the Division of Central Collections of the Department of Finance and Control.

(2) The Resouce Worker will make the referral to the Division of Central Collections of the Department of Finance and Control by means of Form W-348, "Notice of Deserting or Absent Parent". The Resource Worker will obtain information to complete Form W-348 from the case record, Social Worker or directly from the recipient of assistance, when necessary.

(3) The Division of Central Collections of the Department of Finance and Control will be responsible for clearing with appropriate agencies for information concerning the whereabouts of the parent or alleged parent and for advising the District Resource Unit of the results.

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(4) The Division of Central Collections of the Department of Finance and Control takes appropriate action on arrest warrants or referrals from the Superior Court for support action. Cases on which there is no outstanding arrest warrant are referred to the Circuit Court for action.

d. In those cases where there is a pending divorce or pending legal separation the Resource Worker

initiates support by sending a Form W-756 "Court Referral" to the Attorney General. When the divorce or legal separation is finalized and an order of support entered, the Resource Worker makes a referral to the Domestic Relations officer of the Superior Court or if the Superior Court will refer the matter to the Circuit Court for enforcement of support.

In all out-of-state cases where the address is known the Resource Worker refers the supervising relative to the Bureau of Support–Court of Common Pleas for a URESA proceeding.

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Manual of Administration 2287.3-2287.5
Bureau of Assistance

Part II The Individual and Public Assistance

2200 Determination of Eligibility Factors Other Than Need–Factors Applicable in ADC Only

2287. *Child Born Out of Wedlock (Cont'd)*

.3 b. His financial capacity to contribute to the support of the child shall be evaluated.

However, voluntary contributions by the reputed father do not of themselves establish paternity, nor can the continuance of such voluntary support be enforced in the absence of the legal establishment of paternity (filiation proceedings).

c. Where there is a voluntary admission of paternity, it is desirable to have the admission reduced to writing whenever possible. (Refer to 2828. concerning written acknowledgement of paternity as establishing entitlement to OASDI benefits.)

.4 Legal Determination of Paternity (filiation proceedings)

a. It is to the advantage of the child that paternity be legally established since:

1) His support by the father as well as the mother becomes legally enforceable;

2) It may have bearing on his right of inheritance from his father (in certain states other than New Jersey);

3) It may have bearing on such financial benefits as OASDI, servicemen's dependents' allowance, etc.;

4) His identity is established and every child has a right to know his full parental and familial background.

b. Therefore the basic policy shall be to initiate filiation proceedings in respect to every "out-of-wedlock" child except as noted below.

[See 2952. Filiation Proceedings]

.5 Exceptions to Requirement for Filiation Proceedings

Exception to the basic policy may be made when, in the judgment of the welfare board,

based upon disclosure of full information by the ADC recipient, the presenting situation is one in which the disadvantages to the child and his parents outweigh the social and economic advantages that might be accomplished through filiation proceedings. Illustrative situations include the following:

New Jersey Department of Institutions and Agencies, Transmittal Letter #79, Page Date 11/65, Replaces Page Dated 7/62.

a. An older child whose reputed father has not been seen or heard from over a period of years, so that paternity would be hard to prove;

b. A reputed father who is married, has legitimate children to support, and such action would cause family discord or result in deprivation to the legitimate children.

.6 Procedures

a. Unless the welfare board determines that an exception should be made, as provided in .5 above, filiation proceedings shall be initiated either by the mother or should she refuse by CWB as provided in 2952. The CWB shall fully inform the mother about the policy, the reasons for it and shall secure all information available to her which she is willing to provide concerning the identity and whereabouts of the reputed father.

b. When a mother whose application has been approved with the understanding that filiation proceedings are to be initiated later decides she prefers to have her case closed, her wishes shall be respected and no court action initiated.

c. If in an action brought by CWB the mother fails or refuses to provide information leading to the identification of the reputed father to the extent that the court upon examination finds her to be in contempt, the needs of the mother shall be deleted from the grant. (Financial Assistance Manual 201. e. 2) (a).

In any case when the mother of an out-of-wedlock child decides not to apply or requests case closing as in b. above, she shall be informed about other agencies in the community which may be able to help her make appropriate plans. Direct referral service should be offered to her.

New Jersey Department of Institutions and Agencies, Transmittal Letter #129, Page Date 5/73, Replaces Page Dated 7/62.

2900 Other Agency Responsibilities–Legal Procedures

2952. *Filiation Proceedings*

Title 9, Chapter 17 of the Revised Statutes as amended by Public Laws of 1962 authorizes the county welfare boards to initiate proceedings to establish paternity and responsibility for support of a child born, or likely to be born, out of wedlock when such child is, or likely to become, a recipient of Assistance for Dependent Children.

(This authority does not obviate the use of the provisions of Title 9, Chapter 16 of the Revised Statutes under which the mother of the child can bring action and file a complaint in her own name to establish paternity and responsibility for support.)

.1 Effect on Eligibility for ADC

Title 9, Chapter 17 (R.S. 9:17-2) specifically provides ". . . . that the initiation of proceedings under this Chapter shall in no wise be deemed a condition precedent nor a deterrant to the granting of assistance or relief under any law of this State to persons otherwise eligible therefor."

[See 2287. for basic policy on eligibility]

.2 Courts Having Jurisdiction

Such proceedings shall preferrably be initiated in the county juvenile and domestic relations court, but may be initiated in a municipal court

in accordance with local practice.

.3 Parties to the Action

a. A complaint under Title 9, Chapter 17 should be filed in the name of the CWB by the director or other duly authorized representative. The complaint will normally be filed against the reputed father as identified by the mother.

b. There may be cases where the mother refuses, or claims inability, to reveal the identity of the reputed father. In such cases a complaint may be filed naming the defendant as follows: "John Doe, reputed father of (name of child), said name John Doe being fictitious". Such a complaint must be accompanied by an Affidavit of Inquiry made by the CWB director or other duly authorized representative, stating the mother's refusal or inability to identify the reputed father, and that other diligent inquiry has failed to reveal the identity. The court can then hold an examination of the mother and may compel disclosure of the name of the reputed father.

New Jersey Department of Institutions and Agencies, Transmittal Letter #41, Page Date 7/62.

.4 Procedure

a. Normal procedure contemplates that after the complaint is filed, and an examination held as required for disclosure of identity of the reputed father, a warrant will issue against the reputed

father so that when he is personally served he may be subject to the jurisdiction of the court. This is followed by a hearing where testimony is given by the parties, on the basis of which the court decides the issue of paternity.

b. If the court decides that the person charged is the father, an Order of Filiation is made which also specifies the support to be paid by the father for the maintenance of the child, and ". . . . the sum to be paid for the sustenance of the mother during confinement." (R.S. 9:17-2)

c. There will be cases where the reputed father admits paternity and agrees that he will not contest the entry of an Order of Filiation. Such action can be encouraged by CWB interview with the reputed father before initiation of filiation proceedings. In such cases, with the cooperation of the court, the procedure may be simplified in that the issue of paternity and responsibility for support can be adjudicated without issuance of a warrant or formal hearing.

.5 Person or Agency to Receive Payment of Order

See 2320.7 for basic policy in respect to support orders.

Since the average period of continuing eligibility for ADC is relatively short it is recommended that Orders for Support be made payable to CWB only when no other arrangement is feasible or acceptable to the court.

New Jersey Department of Institutions and Agencies, Transmittal Letter #41, Page Date 7/62.

2200 Determination of Eligibility Factors Other Than Need–Factors Applicable in ADC Only

2287. *Child Born Out of Wedlock*

A child born out of wedlock is a child born to a mother who is unmarried; or, if married, by a man other than her husband.

.1 Eligibility

a. The eligibility of a child is not affected by the fact that he was born out of wedlock.

b. The initiation of proceedings to determine paternity and to establish the financial responsibility of the reputed father shall not be a pre-application requirement.

.2 Legal Responsibility of Parents

a. Parents of a child born out of wedlock are equally responsible for his support. To establish that this child is "needy" the ability of both parents to support the child must be determined. In proper circumstances, court action may be necessary to establish paternity of the father, and to obtain such support from the parents. [See 2320. and 2952.]

The possibility of court action shall be explained to the applicant during the application process.

b. Responsible parents of such a child as designated by law are

1) mother of the child,

2) natural father when paternity has been established by filiation proceedings, and

3) husband of the child's mother based on a legal presumption that he is the father of her child, unless and until otherwise determined by a court of competent jurisdiction.

.3 Reputed Father

a. When the reputed father voluntarily admits paternity, the child's needs should be discussed with him and an effort should be made to have him assume the role of responsible parent. [Refer to 2952.4c]

New Jersey Department of Institutions and Agencies, Transmittal Letter #129, Page Date 5/73, Replaces Page 7/62.